TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 71

MARIO DiBELLA, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1960
CERTIORARI GRANTED FEBRUARY 20, 1961

INDEX

Docket Entries

(A)

M-2225 Docket

In the Matter of the Application

of

MARIO DI BELLA

ATTORNEYS

For Plaintiff:
JEROME LEWIS
66 Court Street
Brooklyn 1, N. Y.

(B)

June 17/59	Affidavit and Notice of motion filed for an order suppressing all evidentiary items seized by the Agents of Federal Bureau of Narcotics, etc. (returnable before Inch, J. on July 6, 1959)
July 6/59	Before Inch J. Motion to Suppress etc.—Adjd to Aug 3/59
Aug. 3/59	Before Zavatt J. Motion to Suppress etc.—Adjd to Aug 24/59 on consent.
Aug. 24/59	Before Rayfiel, J: Motion to suppress, etc. adjd. to Aug. 25, 1959 at 11:30 A.M.
Aug. 25/59	Before Rayfiel, J: Motion to suppress, etc. Motion argued. Decision reserved. Exchange papers Sept. 8, 1959 and all papers by September 11, 1959.

Docket Entries

Sept. 11/59	Affidavit filed (Charles L. Stewart)
Sept. 14/59	Affidavit filed (Jerome Lewis)
Sept. 22/59	Minutes of stenographer filed.
Nov. 4/59	By Rayfiel, J: Opinion rendered (See Opinion) Motion denied without prejudice, however, to a renewal thereof on the trial. Settle order on notice.
Nov. 30/59	By Rayfiel, J: Order filed on above motion.
Dec. 3/59	Notice of Appeal filed (Mario Di Bella)

Notice of Motion to Suppress Evidentiary Items, etc.

(43) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Mario Di Bella, the petitioner herein, sworn to the 17th day of June, 1959, and the complaint of Special Agent David W. Costa, of the Federal Bureau of Narcotics, sworn to the 15th day of October, 1958, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a Criminal Term for Motions, to be held before the Hon. Robert A. Inch, in Room 312, on the 6th day of July, 1959, at the Courthouse located at 271 Washington Street, Brooklyn, New York, at 10 o'clock in the forenoon thereof, or as soon as counsel can be heard, for an order suppressing all evidentiary items seized by the Agents of the Federal Bureau of Narcotics, on or about March 9th, 1959, in the petitioner's apartment at No. 35-15 80th Street, Jackson Heights, Queens, New York, and any and all information gleaned from the said seizure, on the ground that the said seisure was illegal and the search unlawful, in violation of the Fourth Amendment of the United States Constitution and Rules 3, 4 and 41 (e) of the Federal Rules

of Criminal Procedure, and for such other and (44) further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York
June , 1959

Yours, etc.,

JEROME LEWIS
Attorney for Petitioner

To:
HON. CORNELIUS W. WICKERSHAM, JR.
U. S. ATTORNEY, EASTERN DIST. OF N. Y.
271 Washington Street
Brooklyn, New York

Affidavit of Mario Di Bella Read in Support of Motion to Suppress, etc.

(45) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

MARIO DI BELLA, being duly sworn, deposes and says:

I am the petitioner in the above-entitled proceeding and submit my affidavit in support of the within application for an order suppressing the use by the Government in any criminal proceeding of any or all of the evidentiary items seized by Agents of the Federal Bureau of Narcotics on or about March 9th, 1959, in my apartment at premises 35-15 80th Street, Jackson Heights, Queens, New York, on the ground that the said seizure was illegal and the search unlawful, in violation of the Fourth Amendment of the United States Constitution and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure.

On or about March 9th, 1959, Agents of the Federal Bureau of Narcotics came to my apartment and after exhibiting to me a warrant for my arrest dated October 15, 1958, proceeded to make a general exploratory examination of my apartment. They discovered a quantity of narcotics in my apartment and seized said narcotics and in addition thereto a suitcase, miscellaneous papers, my passport and divers other items.

Affidavit of Mario Di Bella

I have been advised by my attorney, Jerome Lewis, Esq., that in his opinion the said search and seizure was illegal in that the warrant of arrest which was granted by the United States Commissioner for the Eastern District of New York, based upon the complaint of Special Agent David W. Costa of the Federal Bureau of Narcotics, was fatally defective in that the allegations in the said complaint did not spell out probable cause and that the granting of the said warrant, therefore, was in violation of the Fourth Amendment of the Constitution of the United States and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure.

Deponent respectfully urges that this application to suppress be granted and that the Government be estopped from using said items in any criminal proceeding and any information gleaned therefrom.

(Sworn to by Mario Di Bella, Petitioner on June 17, 1959.)

Complaint of Special Agent David W. Costa Read in Support of Motion to Suppress, etc.

(47) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

EASTERN DISTRICT OF NEW YORK, ss:

DAVID W. COSTA being duly sworn deposes and says that he is a Special Agent of the Federal Bureau of Narcotics, duly appointed according to law and acting as such.

That upon information and belief, the defendants, Mario Di Bella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law. (T. 26 U. S. C. Par. 4704 (a); T. 18 U. S. C. Par. 2).

That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics.

WHEREFORE, your deponent respectfully prays that a warrant be issued for the apprehension of the above-named defendants, that they may be dealt with according to law.

(Sworn to by David W. Costa on October 15, 1958.)

Affidavit of Charles L. Stewart Read in Opposition to Motion

(48) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

EASTERN DISTRICT OF NEW YORK, ss.:

CHARLES L. STEWART being duly sworn deposes and says that he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.

This affidavit is submitted in opposition to the defendant Mario Di Bella's motion to suppress any and all evidence seized in his apartment at the time of his arrest on March 9, 1959. As grounds for his motion, Di Bella alleges that the warrant for his arrest was based on a complaint which does not properly set forth probable cause.

That upon information and belief, the facts of the defendant's arrest are as follows:

FACTS

The defendant Mario Di Bella was arrested in his apartment No. 42 at 35-15 80th Street, Queens, New York, on March 9, 1959, at approximately 8:15 P.M., by Federal Narcotics Agents, David W. Costa, George O'Connor and James P. Murray. Agent Costa was in possession of a warrant for the arrest of Mario DiBella, which had been issued by the United States Commissioner for the Eastern

District of New York on October 15, 1958. Application had been made on October 6, 1958, for a search warrant to search the apartment of (49) Mario DiBella and a complaint and warrant for the arrest of DiBella was prepared the same day. The application for the search warrant was denied by United States Commissioner Salvatore T. Abruzzo, but the complaint and arrest warrant were not presented to the United States Commissioner. Thereafter, on October 15, 1958, the complaint and arrest warrant were submitted to the U. S. Commissioner charging the defendant DiBella with the sale of narcotics on September 10, 1958, in violation of §4704(a) of Title 26 U. S. C. and §2 of Title 18 U. S. C. The complaint and arrest warrant which had been prepared on October 6, 1958 was used and the U. S. Commissioner changed the date on the complaint from October 6, 1958 to October 15, 1958. However, he did not change the date on the arrest warrant. He noted on the complaint that "2 Warrants Issued". The arrest warrant referred to the complaint, charging the sale of narcotics on September 10, 1958, and the disparity in the dates is clearly a clerical error. A copy of the arrest warrant and the complaint are attached hereto as Appendix "A".

On March 9, 1959, the narcotic agents saw the defendant DiBella sitting in his living room in his apartment shortly before they went to the door of Apartment No. 42. The agents rang the bell of the apartment. The door was opened by Jean DiBella, a step-daughter of the defendant. The agents identified themselves to her at once. They showed her their credentials. Jean DiBella then ushered the agents into the apartment. Mario DiBella was in the (50) living room. The narcotics agents identified themselves to Mario DiBella. They then showed him a copy of the warrant for

his arrest and also showed a copy of the arrest warrant to DiBella's wife, Elsie. Agents Coyne and Gohde then joined the other agents in the apartment. The agents asked Di Bella if he would permit them to make a search of the apartment. DiBella then told Agent Coyne "I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart." The defendant DiBella then took the agents to his bedroom and pointed to a closet where the heroin was hidden. Agent Costa removed a brown suitcase from the floor of the closet and placed it on the bed. The suitcase was then opened. It contained approximately a pound of heroin, a quantity of cocaine and certain paraphernalia used to "cut" the narcotics. DiBella stated that this was all the heroin that he had in his possession and that the suitcase contained approximately eighteen to nineteen ounces of heroin altogether.

The agents requested that DiBella's family take possession of their valuable before a search was made of the apartment. Mario DiBella produced a locked, metal box containing $2,675.00. The agents then began to search the apartment for contraband. Agent O'Connor found $6,000.00 in a shoebox hidden in a closet in DiBella's bedroom.

When brought to the office of the United States Attorney prior to his arraignment on March 9, 1959, DiBella admitted that this money, $8,675.00 represented profits which he had made in the sale of narcotics. He stated that (51) he had bought and sold heroin over a period of years and tentatively identified his source of supply and his customer. He also admitted that he had voluntarily turned over the seized heroin to the agents at the time they visited his apartment to arrest him.

Affidavit of Charles L. Stewart

Prior to the arrest of the defendant DiBella, Narcotics Agents David W Costa, and Daniel W. Moynihan, observed the defendant DiBella on two occasions, when he participated in the sale and transfer of heroin. The facts setting forth these observations are more fully set forth in the attached affidavit of Narcotics Agent David W. Costa, the arresting agent (See Appendix "B") and the affidavit of Narcotics Agent Daniel W. Moynihan (See Appendix "C"). These affidavits were prepared in application for the search warrant on October 6, 1958, and were on file with the U. S. Commissioner. These two agents worked together; they were in charge of the case, and the information contained in both affidavits were known to both men.

Agent David W. Costa, the agent who arrested DiBella on March 9, 1959, had observed the defendant DiBella meet with the defendant Samuel Panzarella on August 26, 1958 and on September 10, 1958. On each occasion, this meeting took place minutes before the defendant Panzarella sold narcotics to Agent Daniel W. Moynihan. Agent Costa had also observed the sale of narcotics by Panzarella to Agent (52) Moynihan, immediately following Panzarella's meeting with DiBella. In addition, the defendant Panzarella made statements to Agent Moynihan identifying the defendant DiBella as the source of all narcotics which he sold to Agent Moynihan. Further, Panzarella told Agent Moynihan that the defendant DiBella had been engaged in the illicit traffic of narcotics for many years.

It is apparent from the foregoing that Agent Costa had probable cause to arrest the defendant DiBella without a warrant at any time after the two sales of narcotics on August 26, 1958 and September 10, 1958.

Affidavit of Charles L. Stewart

THE SEIZURE OF NARCOTICS AND MONEY WAS MADE INCIDENTAL TO A LAWFUL ARREST

The arrest warrant was based on a valid complaint (See Appendix "A") which set forth not only the facts of the offense, but also the facts on which the affiant based his conclusion that the defendant DiBella had committed this crime. The source of the complainant's information, and the grounds for his belief were set forth in the complaint as "your deponent's personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics." Here, the complainant's probable cause was based on both his personal knowledge and hearsay information. It is apparent that the United States Commissioner had before him sufficient facts upon which finding of probable cause could be made.

(53) The case of *United States* v. *Giordenello*, 357 U. S. 480 (1958), cited by the defendant DiBella in his Supplemental Memorandum of Law does not apply to the instant case. In the latter case, only the elements of the crime charged were set forth in the complaint. No statement whatsoever was made by the complainant as to whether the charge in the complaint was based on personal knowledge or whether it was based on information and belief. With respect to the absence of such a statement the Court stated at page 486:

> "The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts

> relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.
>
> When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

In the instant case, the affidavits of Agents Costa and Moynihan in support of the application for a search warrant were already on file with the United States Commissioner's office. Although these affidavits set (54) forth in greater detail the probable cause which these agents had to arrest DiBella they were superfluous here, as probable cause was plainly spelled out on the face of the complaint.

In the *Giordenello* case *supra*, the Court suppressed the evidence seized incidental to the arrest of the defendant. However, the Court specifically left open to the government the right to justify the defendant's arrest without relying on the warrant in the event of a new trial. The Court stated at p. 488:

> "Nor do we think that it would be sound judicial administration to send the case back to the District Court for a special hearing on the issue of probable

> cause which would determine whether the verdict of guilty and the judgment already entered should be allowed to stand. The facts on which the Government now relies to uphold the arrest were fully known to it at the time of trial, and there are no special circumstances suggesting such an exceptional course. Cf. *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233. This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant."

Even more recently, the Supreme Court in *Draper* v. *United States*, 358 U. S. 307 (1959) specifically upheld a seizure of narcotics as incidental to a lawful arrest, where the arrest was made by a narcotics agent on the basis of hearsay information alone. In the latter case an informer had given information to a narcotics agent that the defendant Draper would arrive in Denver, Colorado, on or about (55) a certain date, carrying narcotics. The informer had been reliable in the past, and gave the agent a description of the defendant Draper. The agent arrested Draper, searched his person, and found heroin. The defendant Draper made a motion to suppress the evidence seized. This motion was denied and the heroin was admitted as evidence against the defendant at his trial. On conviction, the defendant Draper appealed on the grounds (1) that hearsay information was inadmissible at any trial and should not have been considered by the arresting agent, and (2) that even if it could be considered, it was insufficient to constitute probable cause. The Supreme Court affirmed the conviction, holding that the arrest and search were legal. In discussing the elements required to give probable cause, the Court stated at page 313:

> "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v. *United States, supra,* at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that 'an offense has been or is being committed.' *Carroll* v. *United States,* 267 U. S. 132, 162."

A situation nearly identical to that in the instant case arose in *Lathem* v. *United States,* 259 F. 2d 393 (5th Cir. 1958). The defendant challenged the sufficiency of the warrant on the grounds that the complaint was inadequate in failing to set forth probable cause. In overruling (56) this contention the Court held at pp. 397-398:

> "Appellant challenges the sufficiency of the warrant on the ground that the complaint was inadequate because it was based on hearsay statements by Slotnik, the complaining officer. Brown v. State of Mississippi, 1936, 297 U. S. 278, 286, 56 S.Ct. 461, 80 L. Ed. 682.
>
> Slotnik formulated all the plans of the investigation, accompanied the other agents on each trip to Lathem's drug store, and in fact participated in the illegal sales. He provided the marked money, instructed the agents what to do, stood just outside the window of the drug store, observed the negotia-

tions with Lathem. Slotnick saw Rand pay Lathem, saw Rand receive the morphine, followed Rand from the drug store, and took the morphine into his custody. It cannot be said that the complaint was based on hearsay.

Nor can it be said that the complaint was defective, under the recent decision in Giordenello v. United States, 1958, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503. The Supreme Court declined to pass on whether a warrant may be issued solely on hearsay. The Court held that the complaint was defective because it contained [357 U. S. 480, 78 S. Ct. 1250] 'no affirmative allegation that the affiant spoke with personal knowledge'; and did 'not indicate any sources for the complainant's *belief*. The Court justified the holding, in part, on the ground that the complainant's testimony 'clearly showed that he had no personal knowledge of the matters on which his charge was based'. Here, it is clear that Slotnik had personal knowledge, based his charge on knowledge, not belief, and that the complaint is an affirmative statement from an affiant with personal knowledge. Unlike the Giordenello case, the Commissioner could determine whether there was probable cause for issuance of the warrant. He did not have to accept a mere conclusion. Lathem had the full protection he was entitled to under Criminal Rules 3 and 4, 18 U.S.C.A., and the Fourth Amendment."

(57) In the instant case, Agent David W. Costa had probable cause to arrest the defendant DiBella at any time after September 10, 1958, with or without a warrant (T. 26

U. S. C. (Supp. V) § 7607, added by 104(a) of the Narcotic Control Act of 1956).

The fact that there was a lapse of time between the issuance of the warrant on October 15, 1958, and the defendant's arrest on March 9, 1959, in no way detracts from the validity of the warrant; *U. S.* v. *Joines*, 258 F. 2d 471 (cert. den. 79 S. Ct. 118). The lapse in time was due to the fact that the investigation was continuing, as other persons were involved. The narcotics agents went to DiBella's home on March 9, 1959, to arrest him. Before any search could be made, the defendant DiBella voluntarily revealed the fact that he had narcotics and showed the agents where they were hidden in the apartment. The defendant's claim that the primary purpose of the agents in entering the apartment was to search rather than to arrest is plainly without merit. As the arrest warrant was valid, the arrest was a legal arrest and the seizure was made incidental to a lawful arrest.

THE MOTION TO SUPPRESS MAY PROPERLY BE DEFERRED UNTIL THE TIME OF TRIAL.

A motion to suppress made before the return of the indictment, as here, is generally regarded as an independent proceeding. As such, any final decision on the motion is regarded as a final order and an appeal from that decision may be taken. *U. S.* v. *Poller*, 43 F. 2d 911 (2d Cir. 1930). (58) The Courts have recognized the fact that as a result of this principle it is possible for prosecution to be delayed for months or years while the appeals on such motions are pending. In addition, the holding of a hearing on the motion to suppress, in effect litigates the same ground to be covered, although on different issues, as that at the time

of the trial. To avoid such delays, and to avoid a multiplicity of appeals and trials, while at the same time preserving to the defendant all the constitutional rights to which he is entitled, the Courts have frequently denied such motions, with the express right reserved to the defendant to renew the motion at the time of trial.

Such was the case in *U. S.* v. *Adelman*, 107 F. 2d 497 (2nd Cir. 1939), a case arising in the United States District Court for for the Eastern District of New York. There, the defendant made a motion to suppress certain narcotics seized in the search of the defendant's apartment. There the motion was made prior to the filing of the indictment. The District Court ruled that as there was a conflicting issue of fact presented in the affidavits as to whether the defendant consented to the search, this issue could be resolved at the time of trial. The Court thereupon denied the motion, with leave to the defendant to renew the motion at the time of trial. This procedure was approved by the Court of Appeals. The Court stated that "certainly it was within Judge Byers' discretion to decide that oral testimony was necessary and to leave decision to the trial judge" *U. S.* v. *Adelman*, supra, p. 499.

(59) A recent extensive review of the law as to whether an appeal will lie on a motion to suppress made prior to and after indictment was set forth in *Rodgers* v. *U. S.*, 158 F. Supp. 670 (S. D. Cal. 1958). In discussing the law, the Court stated at page 675:

> "If the motion is filed and the order entered *before* indictment returned, then the order is usually held to be final and independently appealable. . . . Citing cases.
>
> When the motion is *filed after*, and the *ruling made after* the return of the indictment, the order is inter-

locutory and not independently reviewable. . . . Citing cases.

But where motions are made *before* indictment and *ruled on thereafter*, the cases are in conflict. One line of cases holds the orders final and independently appealable. . . . Citing cases. while another line of cases hold the order interlocutory and not independently appealable. . . . Citing cases."

On appeal, the District Court's decision was affirmed by the 9th Circuit, *Rodgers* v. *U. S.*, 267 F. 2d 79 (9th Cir. 1959).

But the problem of the appealability of the order would not arise, when the order is one denying the defendant's motion, with the right to renew it at the time of trial. Such an order would be plainly interlocutory. Rule 41(c) of the Federal Rules of Criminal Procedure states in part:

"The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

The recent decision in *Leiser* v. *U. S.*, 16 F.R.D. 199 (D. Mass. 1954) is in point here. There the District Court continued the motion to suppress until trial, even though (60) the defendant claimed he would be thereby prejudiced. Similar results were reached in *U. S.* v. *Nelson*, 208 F. 2d 505 (D.C. Cir. 1953) cert. den. 346 U. S. 827, and *U. S.* v. *Williams*, 227 F. 2d 149 (4th Cir. 1955).

The source of your deponent's information and grounds for his belief as to the facts of the defendant's arrest set forth above, are the statements to your deponent by Agents

David W. Costa and the other narcotics agents who arrested in the defendant DiBella on March 9, 1959.

WHEREFORE, your deponent respectfully prays that the defendant DiBella's motion to suppress the evidence seized at the time of his arrest on March 9, 1959, be denied without prejudice to the defendant's right to renew the motion at the time of trial, or in the alternative, that a hearing be ordered to determine the question as to whether the arresting agent had probable cause to arrest DiBella on March 9, 1959, and whether the seizure of narcotics and money was a lawful seizure.

(Sworn to by Charles L. Stewart on September 10, 1959.)

Appendix "A" Annexed to Affidavit of Charles L. Stewart

(63)

[WARRANT TO APPREHEND]

Cr. 45902
Comm. Docket #1
Case 5

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO ANY SPECIAL AGENT, BUREAU OF NARCOTICS, and/or To the Marshal of the United States for the Eastern District of New York and to his Deputies or any or either of them—GREETING:

WHEREAS, complaint on oath hath been made to me, charging that

MARIO DI BELLA

did on or about the 10th day of September, in the year one thousand nine hundred and fifty-eight, at the Eastern District of New York, in violation of Section 4704(a), Title 26 and Title 18 U. S. C. Sec. 2 unlawfully sell, dispense and distribute a narcotic drug, to wit: one ounce of heroin hydrochloride, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law as more fully set forth in the complaint this day filed in my office, a certified copy of which is hereto attached, against the peace of the United States and their dignity, and against the form of the statute of the United States in such case made and provided.

NOW, THEREFORE, YOU ARE COMMANDED, in the name of the President of the United States of America, to apprehend the said MARIO DI BELLA and bring his body forthwith be-

fore me, or some judge of the United States, wherever in the Eastern District of New York he may be found that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this 6th day of October in the year of our Lord one thousand nine hundred and fifty-eight.

(Signature illegible)
United States Commissioner
of the Eastern District of New York.

APPROVED:

CORNELIUS W. WICKERSHAM, JR., CCS
United States Attorney
of the Eastern District of New York.

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(64) [RETURN]

Received this WARRANT on the 6th day of October, 1958 at Brooklyn, New York, and executed the same by arresting the within-named

MARIO DI BELLA

at Brooklyn, New York, on the 9 day of March, 1959, and have his body now in court, as within I am commanded.

DAVID W. COSTA
Narcotic Agent

Appendix "A" Annexed to Affidavit of Charles L. Stewart

(65) [FINAL COMMITMENT]

Pol. Officer
Agent DAVID W. COSTA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Time 11 30 AM

THE UNITED STATES

VS

MARIO DI BELLA
35-15—80 St Jackson Heights NY
Queens
Age 52 White U.S.
Charged with violation U.S.C.
Title 26 & Title 18 USC Sec 2
Section 4704(a)

Sept 10 1958.

Defendant duly arrainged before me March 10 1959, and, after, having been informed of the charge against him/her and his/her rights to aid of counsel, waived examination, it is

ORDERED that said defendant be held to answer to the charge and any order of the court and that bail be fixed in the sum of $10,000— and that he/she be committed to the custody

Appendix "A" Annexed to Affidavit of Charles L. Stewart

of the United States Marshal for the Eastern District of New York, and by said Marshal duly committed to the custody of the United States Detention Headquarters, 427-431 West Street, in the Borough of Manhattan, City of New York, until such bail is given.

Dated, Brooklyn, N. Y., March 10 1959.

(Signature illegible)
United States Commissioner for the Eastern District of New York.

Defendant having given bail, it is ordered that be released from custody.

Dated, Brooklyn, N. Y., March 10 1959.

(Signature illegible)

United States Commissioner for the Eastern District of New York.

Appendix "B" Annexed to Affidavit of Charles L. Stewart

[Affidavit of David W. Costa]

(68) UNITED STATES DISTRICT COURT

Eastern District of New York

[Same Title]

Eastern District of New York, ss.:

David W. Costa being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with Daniel D. Moynihan, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale not from the original stamped packages and not pursuant to any written order form in violation of the provisions of the Internal Revenue Tax Laws.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Appendix "B" Annexed to Affidavit of Charles L. Stewart

Upon information and belief, Mario DiBella rents apartment #42 at 35-15 80th Street, Jackson Heights, Queens, New York.

(69) At 7:30 A.M. on August 26, 1958, I observed Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, Long Island, New York. DiBella walked to the street and entered his Chrysler automobile New York License No. 6971NE. DiBella drove to 37th Avenue and 79th Street, Jackson Heights, where he met one Sammy Panzarella, who entered the Chrysler automobile driven by DiBella. The two men drove to Roosevelt Avenue and 79th Street where Panzarella left the car. I observed Panzarella walk to 78th Street, where, upon meeting Agent Moynihan, Panzarella handed a small envelope to him. Later tests showed that this envelope contained heroin hydrochloride.

A second purchase of heroin from Panzarella was arranged by Agent Moynihan to be effected September 10, 1958.

At 11:00 P.M. September 10, 1958, I observed Mario DiBella leave Apartment #42 at 35-15 80th Street, Jackson Heights, New York and walk to Roosevelt Avenue and 74th Street where he met Panzarella. DiBella and Panzarella then walked to 76th Street near Roosevelt Avenue, where they parted company. Panzarella then met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he claimed he had obtained from DiBella.

Upon information and belief, Mario DiBella has been a source of supply of heroin hydrochloride to Samual Panzarella over a period of years; that on each of the two occasions described above, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York and proceeded directly to meet Samuel Panzarella; that Samuel

Appendix "B" Annexed to Affidavit of Charles L. Stewart

Panzarella (70) then proceeded directly to Agent Moynihan and sold him a quantity of heroin hydrochloride.

That the source of your deponent's information and the grounds for his belief are the investigation and reports of Agents of the Bureau of Narcotics; the statements of Samuel Panzarella and other witnesses and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David W. Costa on October 6, 1958.)

Appendix "C" Annexed to Affidavit of Charles L. Stewart

[Affidavit of Daniel D. Moynihan]

(72) UNITED STATES DISTRICT COURT

Eastern District of New York

[Same Title]

Eastern District of New York, ss:

Daniel D. Moynihan being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with David W. Costa, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely; heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale and that these drugs are not from the original stamped packages and not pursuant to any written order form, in violation of the provisions of the Internal Revenue Tax Laws.

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The facts tending to establish the grounds for the issuance of a search warrant are as follows:

Your deponent met one Samuel Panzarella who offered to sell heroin to your deponent. At the time of the meeting, Samuel Panzarella and your deponent agreed to effect the sale of heroin to your deponent, this sale to be made on August 26, (73) 1958 at 8 o'clock in the morning. At six o'clock in the morning on August 26, 1958, your deponent met Samuel Panzarella in Manhattan. Samuel Panzarella stated that he wished to telephone his source of supply of heroin, and he thereupon made a telephone call. After the telephone call was completed, Samuel Panzarella stated to your deponent that delivery of the heroin would be made to your deponent at 8:30 A.M. that morning.

Your deponent then drove with Samuel Panzarella to Jackson Heights, Long Island and parked on 79th Street, north of Roosevelt Avenue. Samuel Panzarella left the vehicle at about 7:30 A.M. that morning and your deponent observed him walk to 79th Street and 37th Avenue and enter a green Chrysler, New York license #6971 XE. Your deponent observed Samuel Panzarella leave that Chrysler several minutes later at 79th Street and Roosevelt Avenue. Samuel Panzarella then returned to the vehicle used by your deponent, and at 8:05 A.M. that morning Samuel Panzarella handed your deponent a glassine envelope containing a white powder which subsequent tests proved to be an ounce of heroin hydrochloride.

A similar pattern of events followed on September 10, 1958. At 9:30 in the evening of September 10, 1958, Samuel Panzarella and your deponent met in Manhattan, where Samuel Panzarella offered to sell your deponent another ounce of heroin. Samuel Panzarella stated that it would again be necessary to go to Jackson Heights to meet his

"connection", (74) and that he would telephone his "connection". Panzarella then made a telephone call at 9:40 P.M. on September 10, 1958. Your deponent and Samuel Panzarella went to 74th Street and Roosevelt Avenue, Jackson Heights, Long Island, New York. At 11:05 P.M. Samuel Panzarella left your deponent. Your deponent observed him meet Mario DiBella a few minutes later, and saw Mario DiBella walk with Samuel Panzarella from 74th Street to 37th Road. Samuel Panzarella returned to your deponent at 11:20 P.M. and your deponent and Samuel Panzarella then drove to New York City. Enroute, Samuel Panzarella handed a glassine envelope containing a white powder to your deponent, which powder was tested and found to be heroin hydrochloride.

Samuel Panzarella stated that DiBella was his source of supply of heroin and that DiBella had supplied the heroin sold to your deponent on September 10, 1958 and August 26, 1958.

No tax stamps were seen by your deponent on either of the glassine envelopes received from Samuel Panzarella on September 10, or August 26, 1958, nor was the sale of these two packages pursuant to a written order form.

Upon information and belief, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York on each of the two occasions described above and met Samuel Panzarella directly thereafter; that Samuel Panzarella then directly proceeded to meet your deponent and the sale of heroin was effected: that Mario DiBella (75) has been a source of supply of illegal heroin hydrochloride for an extended period.

That the source of your deponent's information and the grounds for his belief are the statements made by Samuel

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Panzarella, the observations and investigation of other narcotic agents and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David D. Moynihan on October 6, 1958.)

Reply Affidavit of Jerome Lewis Read in Support of Motion

(76) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

JEROME LEWIS, being duly sworn deposes and says:

I am the attorney for the petitioner herein.

This affidavit is submitted in reply to the opposing affidavit of the government.

Deponent respectfully submits that the government's opposing affidavit does not create any issues of fact for this Court to consider. The affidavit is made by Assistant United States Attorney Charles L. Stewart and the allegations contained therein are not based upon his own personal knowledge. On page 13 of the said affidavit, Mr. Stewart alleges:

> "The source of your deponent's information and grounds for his belief as to the facts of the defendant's arrest set forth above, are the statements to your deponent by Agents David W. Costa and the other narcotics agents who arrested the defendant DiBella on March 9, 1959".

While it is a moot question whether hearsay evidence may be used solely for the purpose of obtaining a warrant as indicated by the Supreme Court in Giordenello v. U. S., 357 U. S. 480, wherein the Court said (p. 485):

> "But we need not decide whether a warrant may be issued solely on hearsay information",

never has it been held that on the trial of an action or on a hearing as we have in the present application, that a government prosecutor may testify or submit a sworn affidavit as to facts of which he had no personal (77) knowledge, but facts which were allegedly told to him by a government agent.

The affidavits of Agents Costa and Moynihan sworn to on October 6, 1958, five months prior to the arrest of the petitioner certainly have no relevancy as to what transpired on the night of the arrest nor should be considered on the question of the validity of the complaint upon which the warrant of arrest was issued, for these affidavits were not presented to United States Commissioner Epstein.

The opposing affidavit sets forth a summary of facts as to what occurred on March 9, 1959, in the petitioner's apartment (pgs. 2, 3).

These facts are not the result of the prosecutor's own knowledge or information, they are purely hearsay.

Deponent has not submitted counter-affidavits from Jeanne Di Bella and Mario Di Bella for it is deponent's contention that the allegations in the opposing affidavit as to the events of March 9, 1959, should not be considered by this Court for they are inadmissible.

Deponent has conferred with both Miss Di Bella and Mr. Di Bella and was told by Miss Di Bella that on March 9, 1959, the upstairs bell rang and she opened the apartment door. A man showed her a badge and he and several other men walked into the apartment. They walked right into the living room which is adjacent to the hall corridor where her father was seated.

Mr. Di Bella informed deponent that the agents came over to him and said they were narcotics agents. They showed him a warrant and said he was under arrest and not to leave the apartment. About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents.

The statements given to deponent by Miss Di Bella and the petitioner are no more admissible in evidence that the statements of the narcotic agents to government counsel. Neither should be given any consideration by this Court. They present no issues of fact.

The issues before this Court are purely one of law: (78)

1. Was the warrant of arrest issued on October 6, 1958, invalid because the complaint upon which it was issued failed to state facts sufficient to spell out probable cause?

2. Was the warrant of arrest used as a pretext to make an exploratory search of petitioner's apartment?

3. Was the warrant of arrest invalid in that it was issued on October 6, 1958 and the complaint executed on October 15, 1958?

Deponent will discuss these issues seriatim.

a. The complaint of Agent Costa upon which the warrant was allegedly issued is wholly devoid of any facts. The allegations are based upon information and belief. There was nothing in the complaint upon which the Commissioner could predicate a finding of probable cause. At the oral

argument of this motion, the Court quickly realized this situation for the Court asked government counsel the following (pgs. 30, 34 of the hearing minutes):

> The Court: Were these facts or any of them officially brought to the attention of Commissioner Epstein at the time a warrant was issued?
>
> Mr. Stewart: You mean verbally?
>
> The Court: You said officially, apparently they weren't in the affidavit because Mr. Lewis says they were not.
>
> Were they questioned by the Commissioner?
>
> Was any of this information brought to the attention of the Commissioner, Commissioner Epstein, so that they may have been considered by him in satisfying himself that there was probable cause?
>
> Mr. Stewart: I would have to check on that. I don't recall.
>
> There was some discussion whether it covered the probable cause question or not, I cannot say. I know there was a discussion as to the need for secrecy in the issuing of the warrant, and the reasons for that I believe were given.
>
> I would have to check with the agents who were present at that time. Of course, the search warrant was sought and the search warrant application was denied.
>
> The Court: Then using the arrest for a basis for making a search of the premises? (p. 35)
>
> The Court: Incidentally, are any of the details to which you referred contained in the affidavit which was submitted in support of (79) the application for the warrant?

Mr. Stewart: Those details were not, but they were brought before the Commissioner in the Government's application for a search warrant.

Mr. Lewis: Your Honor, I am sorry to interrupt, but there were two different commissioners involved here, so the facts couldn't have been brought before Commissioner Epstein.

The Court: You said that.

You told me that Commissioner Abruzzo had denied the application for a warrant.

Mr. Stewart: That is right, sir.

He denied it (page 31, minutes).

The opposing affidavit is strangely silent as to the Court's inquiry. Mr. Stewart's affidavit does not answer the Court's question. Affidavits have not been submitted by narcotic agents nor an affidavit from Commissioner Epstein as to whether he made such an inquiry. The conclusion is inescapable that no such inquiry was made by Commissioner Epstein.

The cases are legion in holding that when a complaint for a warrant is presented to a Commissioner based upon information and belief, it is the duty of the Commissioner to make inquiry of the complainant as to the sources of his information and the grounds of his belief so as to enable the Commissioner to determine in his own mind whether there is probable cause to believe that an offense has been committed.

De Hardit v. U. S., 224 F. 2d 673
U. S. v. Dolan, 113 F. Supp. 757, 761
U. S. v. McCunn, 40 F. 2d 295

Reply Affidavit of Jerome Lewis

Matter of Rule of Court, C.C. Ga. 1877, 3 Woods, U. S. 502, 20 Fed. Cases No. 12,126

In Giordenello v. U. S., 357 U. S. 480, the Supreme Court said (p. 486):

> "No warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the person or things to be seized, of course applies to arrest as well as search warrants. The purpose of a complaint is to enable the Commissioner to determine whether the probable cause required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the (80) complainant's mere conclusion that the person whose arrest is sought has committed a crime."

Rules 3 and 4 of the Federal Rules of Criminal Procedure must be read in light of the constitutional requirements (4th Amend.) they implement. Under Rules 3 and 4, supra, a complaint presented to a Commissioner for the issuance of a warrant must set forth facts with definiteness from which the existence of probable cause can be determined.

U. S. v. Young, 14 F.R.D. 406
Reffer v. U. S., 178 F. 24
Veeder v. U. S., 252 F. 414
U. S. v. Lassiff, 147 F. Supp. 944
U. S. v. Castle, 138 F. Supp. 436
U. S. ex rel. King v. Gokey, 32 F. 2d 793

Reply Affidavit of Jerome Lewis

Nathanson v. U. S., 290 U. S. 41
U. S. v. Freeman, 165 F. Supp. 121
U. S. v. Lester, 21 F.R.D. 376

In Giles v. U. S., 284 F. 208, 214, the Court made this very cogent observation:

> "In this case, as no facts whatever were put before the Commissioner, he was evicted from his judicial function, and remitted to a performance purely regulatory. The prohibition agent was applicant, affiant, in effect the judge of the existence of probable cause, and the officer serving the writ. This is a very dangerous amalgamation of powers."

In the instant case, Agent Costa was the applicant, affiant and the officer serving the warrant. To sustain the validity of the said warrant would in effect make Agent Costa, the judge of the existence of probable cause. This would be a very dangerous amalgamation of powers.

The Government realizing that the warrant obtained on October 6, 1958, was invalid because it was obtained upon a complaint that was defective, now makes the belated assertion that even if the warrant is invalid, that Agent Costa had probable cause to arrest Di Bella at any time after September 10, 1958, with or without a warrant, citing 26 U.S.C.A. Sec. 7607 (p. 10 opp. aff.).

(81) During the course of the oral argument of this application, this Court asked Mr. Stewart (p. 39, minutes):

> "The Court: If he had enough knowledge justifying arrest why did he need a warrant?
>
> Mr. Stewart: He didn't need a warrant in this case.

> The only reason that it was given to him because he asked for one as a matter of bureau policy. * * *
> I am very sorry that the warrant was ever issued, but it is too late."

On October 6, 1958, the Government appeared before Commissioner Abruzzo and made an application for a warrant to search the apartment of Di Bella. Commissioner Abruzzo after reading the affidavits of Agents Costa and Moynihan (App. B and C, Opp. Aff.) denied the application (Ex. A attached hereto), undoubtedly, on the ground of the lack of probable cause. When the Government saw that its application for a search warrant had been denied, it decided not to submit Costa's complaint for the issuance of an arrest warrant. A scrutiny of the said complaint reveals that it was originally dated October 6, 1958, and that thereafter the "6" was changed to "15th".

A warrant for the arrest was issued by Commissioner Epstein on October 6th, 1958. In fact, two warrants were issued, one for Di Bella, the other for Panzarella. If Costa believed that he had reasonable grounds to arrest Di Bella on October 6th, 1958, without the necessity of obtaining a warrant, he would have proceeded to do so. It is significant to note that in the opposing affidavit, Mr. Stewart does not repeat the statement made on the oral argument that it is a matter of bureau policy to obtain a warrant.

The Government admits that Agent Costa was in possession of the warrant of arrest when he and other agents went to Di Bella's apartment on March 9th, 1959, at 8:15 P.M.; that Di Bella was arrested pursuant to the said warrant which was exhibited to Di Bella (pgs. 2, 3, opp. aff.). The return of the warrant states as follows:

Reply Affidavit of Jerome Lewis

"RETURN

"Received this warrant on the 6th day of October, 1958 at Brooklyn, New York, and executed the same by arresting the within-named Mario Di Bella (82) at Brooklyn, New York, on the 9 day of March, 1959, and have his body now in court, as within I am commanded.

DAVID W. COSTA
per Narcotic Agent (Ex. B attached hereto)"

The Government utilized the warrant to make the arrest. Based upon the said arrest, the Government agents then proceeded to search the apartment. In effect, the argument advanced that Agent Costa had probable cause to arrest Di Bella without a warrant (p. 10 opp. aff.) is abandoned by the Government for the following statement appears on page 10 of the opposing affidavit:

"As the arrest warrant was valid, the arrest was a legal arrest and the seizure was made incidental to a lawful arrest."

No affidavit from any narcotic agent has been submitted in the opposing papers to justify the existence of probable cause for the arrest of Di Bella on March 9, 1959. Certainly, affidavits made by agents on October 6, 1958 and the date later changed to October 15th on the complaint of Costa, cannot be considered on this present motion to suppress. The affidavits dated October 6, 1958 were used in an endeavor to obtain a search warrant, which was denied by Commissioner Abruzzo. The Government should not be permitted to resurrect these affidavits approximately one year later to justify the existence of probable cause on an

arrest made five months after the application for a search warrant.

As was said by the Court of Appeals in this Circuit, speaking through Moore, J. in U. S. v. Volkell, 251 F. 2d 333, 336:

> "The scope of the word reasonable in 26 USCA, Sec. 7607 (2) must be construed in relation to the safeguards granted in the Fourth Amendment to the Constitution against unreasonable searched and seizures."

The facts and circumstances in the instant matter indicate beyond any peradventure of doubt that the warrant of arrest issued on October 6, 1958 was the medium whereby Di Bella was arrested and that the search of Di Bella's apartment was conducted as an incident to that arrest. This allegation is admitted by government counsel and is his chief argument in opposition to the motion to suppress (p. 10 opp. aff.).

(83) In Jones v. U. S., 357 U. S. 493, the Supreme Court stated that it is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling house cannot of itself justify a search without a warrant. On page 500, the Court said:

> "The Criminal Rules specifically deal with searches of this character by restricting nighttime warrants to situations where the affidavit upon which they are issued are positive that the property is in the place to be searched."
>
> "This Rule is hardly compatible with a principle that a search without a warrant can be based merely upon probable cause."

Reply Affidavit of Jerome Lewis

The search of Di Bella's apartment was made in the nighttime.

In U. S. v. Rabinowitz, 339 U. S. 56, the agents executed a valid warrant of arrest prior to their search, which they had previously obtained for the defendant's arrest. The court stressed that the legality of the search was entirely dependent upon an initial valid arrest.

In the instant matter, the search was made in the nighttime. The agents did not obtain a search warrant. A previous application for a search warrant had been denied. Since the search was dependent upon the validity of the arrest and since the warrant of arrest was invalid, it follows the night the day, that the search was illegal.

In Giordenello v. U. S., supra, the Court said on page 481:

> "The Government recognizes that since Finley had no search warrant, the heroin was admissible in evidence only if its seizure was incident to a lawful arrest." (citing U. S. v. Rabinowitz, supra)

In the above case, the Supreme Court found that the complaint upon which the warrant was issued was defective in that it did not set forth facts sufficient to spell out probable cause. The court found that the warrant should not have been issued; that the seizure was illegal and that the seized narcotics should not have been admitted in evidence.

The cases cited by the Government to sustain its position are proof positive that petitioner's application should be granted.

(84) In Giordenello v. U. S., supra, the Court said (p. 486):

> "The purpose of a complaint is to enable the Commissioner to determine whether the probable cause

required to support a warrant exists. *The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause.* * * * " (emphasis added)

In the present application, there were no facts presented to the Commissioner to justify the issuance of a warrant.

The Government contends that the complainant's probable cause was based on both his personal knowledge and hearsay information. However, in the complaint nothing is set forth to indicate to the Commissioner what the agent's personal knowledge was and what the hearsay information consisted of. Mere conclusions cannot take the place of facts.

In U. S. v. Freeman, 165 F. Supp. 121, the affiant had personal knowledge and was possessed of the essential facts to be present in the complaint to show probable cause, but the complaint failed to set forth these facts and the court found that the warrant for the arrest of the defendant was illegal.

The Government states that the affidavits of Agents Costa and Moynihan in support of the application for a search warrant were on file with the United States Commissioner's office. This is an erroneous statement of fact because upon denial of the application of the Government for a search warrant, the Commissioner forwards the papers to the Clerk's office. The said application for a search warrant was made before Commissioner Abruzzo. The application for the warrant of arrest was made before Commissioner Epstein. Commissioner Epstein never saw these affidavits for they were not in his office at the time of the application nor did the Government present the affidavits to him.

Draper v. United States, 358 U. S. 307 concerned itself

with the question whether the government agent's knowledge of the facts related to him by an informant who was a special employee of the Bureau of Narcotics spelled out probable cause. A very detailed statement of facts was given by the informer to the agent. The agent verified these facts. When defendant alighted from a train and proceeded to walk at a very fast pace towards the station exit, the agent arrested (85) him. If the agent had not made an immediate arrest, his quarry would have flown and the agent would have been derelict in his duty.

In the present application, there were no special circumstances confronting the agents as in the Draper case. They knew where the petitioner resided. There was no reason to suspect that he would flee. The fact is that five months after the issuance of the warrant, he was arrested in his home.

Moreover, in the Draper case the information was given directly to the Agent by a reliable informant.

In the instant case, Costa never spoke to the informant. Whatever information he received may have been told to him by agent Moynihan. While under certain circumstances where the exigencies of time create a situation where immediate action is imperative, hearsay evidence is admissible, never have our courts extended the doctrine that hearsay upon hearsay is permissible. What Moynihan was told by Panzarella was hearsay to Moynihan. What Moynihan told Costa was then a double hearsay.

In U. S. v. Lassoff, 147 F. Supp. 944, 948 the Court said:

> "A warrant cannot issue by placing an inference upon an inference as it is well established that the basis of a presumption must be fact and not another presumption."

However, even if Moynihan related to Costa what he had been told by Panzarella, the substance of such conversation was not set forth in Costa's complaint. The opposing papers contain only an affidavit of government counsel and his conversations with Costa would be hearsay upon hearsay upon hearsay.

The suggestion to this Court by the Government that the motion to suppress be deferred until the time of trial is indicative of the weakness of their argument.

Evidence received by an unlawful search and seizure may be suppressed on an application before indictment. A final decision on the motion is considered a final order and an appeal may be directly taken.

Application of Fried, 68 F. Supp. 961
Perlman v. U. S., 247 U. S. 7
U. S. v. Poller, 2 Cir. 43 F. 2d 911

(86) The prosecutor sets forth in his affidavit a harrowing description of what might happen if this motion was not denied without prejudice to a renewal at the time of trial.

Deponent is amazed at the temerity of the prosecutor to insinuate that this application was made for the purpose of delay. Any and all delays in the determination of this application has been as the result of the procrastination and dilatory tactics of government counsel. Let's look at the record:

Motion papers were served on the government on or about June 17, 1959 returnable July 6th. On July 6th, deponent was in court prepared to argue the motion. Mr. Stewart argued loud and long for an adjournment and over deponent's strenuous objection, Judge Inch granted the

government's request and adjourned the motion to August 3rd. On August 3rd, before Judge Zavatt, the Government once again requested an adjournment to August 24th. On August 24th, the motion was put down for argument on August 25th. The motion was argued on August 25th. Mr. Stewart presented no papers on the argument and asked for time to reply to deponent's memorandum. The Court granted Mr. Stewart's request and told him to have his papers in by September 8th. Prior to September 8th, Mr. Stewart requested that the Court give him additional time to file his papers and his time was extended to September 11th.

Petitioner pleaded to the indictment found against him on July 14th. If it were not for the government's insistence that the motion be adjourned on July 6th, the motion most likely would have been decided prior to the pleading to the indictment. The Government cannot profit by its delaying tactics then cite cases in support of their alleged contention that to litigate the issue of suppression would result in a delay of the prosecution of the case. This application is one of law. A formal hearing to take testimony is not needed. No affidavits were presented by the agents which created issues of fact. The statement of the prosecutor that the source of his information and grounds of his belief as to the facts are the statements of Agent Costa and other narcotics agents made to him is hearsay and cannot be considered as evidence to create factual issues.

(87) It is deponent's further contention that this application should be granted because the warrant of arrest was used as a pretext to make an exploratory search of petitioner's apartment.

The warrant of arrest was issued on October 6, 1958. It

was not executed until March 9, 1959. Government's papers in opposition (page 10) state that the lapse of time was due to the fact that the investigation was continuing as other persons were also involved, cannot be considered by this court. This is a hearsay statement of the prosecutor. No reason is advanced why the agent's who allegedly made this statement did not submit an affidavit to that effect. An affidavit based upon information and belief has never been countenanced by our courts. Assuming arguendo, that this court consider this hearsay allegation, nevertheless, the facts belie this assertion.

On October 6, 1958, the Government applies for a search warrant of petitioner's apartment. If the warrant had been granted and a search made whether successful or not, both petitioner and others alleged to be involved would have been immediately put on notice. Common sense dictates that this is no way to conduct an investigation if the purpose is to apprehend other persons acting in concert with petitioner.

There are no reasons advanced to this court why on March 9, 1959, agents arrested petitioner and then proceeded to search his apartment.

The fact that narcotics were found in petitioner's apartment on March 9, 1959 does not justify the use of a warrant as a pretext to make a search.

An invalid search is not made lawful by what it brings to light.

U. S. v. Spalino, 21 F. 2d 567
U. S. v. Glasser, 270 F. 818
U. S. v. Costanzo, 13 F. 2d 259
Garshe v. U. S. 1 F. 2d 620

Reply Affidavit of Jerome Lewis

As was said by Judge McAllister in Worthington v. U. S., 166 F. 2d 566,

> "all the circumstances disclose that the arrest was made as a pretext to search for evidence, and on that ground alone, the evidence should have been suppressed."

(88) In Henderson v. U. S., 12 F. 2d 528, 531, the court stated:

> "And when it appears as it does here, that the search and not the arrest was the real object of the officers in entering the premises, and that the arrest was a pretext for or at most an incident of the search, ought such search be upheld as a reasonable one within the meaning of the constitution? Manifestly not."

See:

U. S. v. Lefkowitz, 285 U. S. 452

Deponent's further contention that the warrant of arrest is invalid is predicated upon the court records. The warrant of arrest is dated October 6, 1958. It was granted by Commissioner Epstein on October 6, 1958. The complaint is dated October 15, 1958. The return of the warrant dated March 9, 1959 states that Agent Costa received the warrant of arrest on October 6, 1958.

A warrant must be based upon a complaint containing sufficient facts to spell out probable cause. The complaint in this matter is dated nine days after the issuance of the warrant. The statement of government counsel that the U. S. Commissioner changed the date on the complaint from October 6th to October 15th but did not do so on the war-

rant is not based on his own knowledge but is pure speculation. Neither an affidavit of the Commissioner or of any agent is submitted to substantiate this statement (p. 2, opp. aff.).

Deponent calls to the attention of this Court that under the word approved on the warrant there appears the name of the United States Attorney and the initials of Mr. Stewart. It therefore appears that both Mr. Stewart and Commissioner Epstein obviously saw the date October 6th and if it was an error either one would have changed it. It seems unlikely that two people could have made the same mistake.

There is a presumption of the regularity of court records. This presumption has not been rebutted.

As a conclusive reason why this application should be granted, deponent cites the case of Latham v. U. S., 259 F. 2d 393, cited in the opposing affidavit:

(89) In Latham v. U. S., supra, the government agent did the following:

a. formulated all the plans of the investigation.

b. accompanied the agents on each trip to the defendant's drug store.

c. participated in the illegal sales.

d. provided the marked money.

e. instructed the agents what to do.

f. stood just outside the window of the drug store and observed the negotiations with defendant.

g. Saw one of the agents pay defendant money and receive morphine in return.

h. Followed the purchaser of the morphine from the drug store and took the morphine in custody.

Under such statement of facts, the complaint of this government agent could in nowise be deemed hearsay.

The court held:

> "Here, it is clear that Slotnick (agent) had personal knowledge, based his charge on knowledge, not belief, and that the complaint is an affirmative statement, from an affiant with personal knowledge."

In the instant application, agent Costa had no personal dealings with Panzarella. He played a minor part in the proceedings except for a surveillance.

Unlike the Latham case, Costa's complaint was based on information and belief. In Latham, the agent set forth his observations in an affirmative statement based upon personal knowledge. The facts spelled out in the complaint were more than sufficient to show probable cause.

In our case, there were no facts spelled out in the complaint to enable the Commissioner to find probable cause.

It is respectfully submitted that the application to suppress should be granted.

(Sworn to by Jerome Lewis on September 14, 1959.)

Exhibit A Annexed to Reply Affidavit of Jerome Lewis

(90) UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

Commissioner's Docket No. 2
Case No. 110

UNITED STATES OF AMERICA,

—v.—

MARIO DIBELLA and SAMUEL PANZARELLI,
Defendants.

SEARCH WARRANT

To Hon. Salvatore T. Abruzzo, United States Commissioner, EDNY

Affidavit having been made before me by DAVID W. COSTA and DANIEL D. MOYNIHAN Agents of the Bureau of Narcotics, District No. 2 that they have reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, Long Island, New York in the Eastern District of New York there is now being concealed certain property, namely heroin hydrochloride, a devivative of opium and the grounds for the issuance of this warrant are set forth fully in the attached affidavits of Narcotic Agents David W. Costa and Daniel D. Moynihan, of the Federal Narcotic Bureau and as I am satisfied that there is probable

cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

Your are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 6th day of October , 1958.

Denied 10/6/58

U. S. Commissioner.

Minutes of Hearing

(1) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Brooklyn, New York,
August 25, 1959.

Before:

HONORABLE LEO F. RAYFIEL,
U. S. D. J.

Appearances:

JEROME LEWIS, ESQ.,
Attorney for Petitioner.

CORNELIUS W. WICKERSHAM, JR., ESQ.,
United States Attorney for the
Eastern District of New York,

BY: CHARLES STEWART, ESQ.,
Assistant United States Attorney.

MICHAEL J. MIELE
Official Court Reporter

(2) Mr. Lewis: May it please your Honor, this is an application to suppress evidence seized by the Government on March 10th, 1959, on the grounds that the warrant of arrest which was issued to the Government was invalid be-

cause the complaint upon which it was based was defective, did not contain sufficient facts, nor any facts to constitute probable cause; also on the grounds that the warrant of arrest used was merely used as a pretext to make an exploratory search of the petitioner's apartment; also on a further ground, on a technical ground, that the warrant which was issued on October 8th, 1958, was predicated upon a complaint which was executed on October 15th, 1958.

The Court: Give me those dates again, please.

You say the warrant was issued when?

Mr. Lewis: October 6th, 1958.

The complaint upon which the warrant is based is dated October 15th, 1958.

The Court: Do you have both papers there?

Mr. Lewis: Yes.

Briefly I will explain the facts to you as up here in the file.

On October 6th, 1958, the Government made an (3) application before United States Commissioner Abruzzo for a search warrant.

There are two affidavits attached, one by Agent Moynahan, and Agent Costa with a full exposition of the facts.

Commissioner Abruzzo so denied the search warrant.

The Court: Did he state the grounds?

Mr. Lewis: No, he just says, denied, October 6th, 1958, and we must presume that it was denied that there wasn't probable cause for the issuance of a search warrant.

Now, on October 6th, 1958, Commissioner Epstein issued a warrant of arrest.

The warrant of arrest states:

Whereas a complaint on oath has been made to me charging—

And then it sets forth the allegations to a crime—

As more fully set forth in the complaint this day filed in my office a certified copy is hereto attached.

We look at the complaint, your Honor, and we find out that the complaint is dated October 15th, (4) 1958.

So on that ground alone, I contend that there was nothing before the Commissioner for him to issue a warrant of arrest because rules three and four of the Rules of Criminal Procedure and Article 4 of the Constitution distinctly state that a complaint must be exhibited to the Commissioner or to a magistrate showing probable cause in order for him to issue a warrant.

The Court: Hand it up to me, please.

Mr. Lewis: Yes.

I also wanted to call your Honor's attention to—

The Court: Just a moment, please.

Did you notice, of course, that the five in fifteen which is written in ink covers a six typewritten?

Mr. Lewis: That is right.

The Court: So that before this change was made, obviously it was a change, a five superimposed upon the typewritten six.

They both were written on October 6th.

Mr. Lewis: Yes, but also all I can go is by what is on there.

(5) I also go by the return.

If you look on the back of the warrant, there is a return that shows that it was executed.

The return says, a warrant of arrest dated October 6th, and not October 15th.

Also looking at the records of Commissioner Schiffman, there is a notation in his records that the petitioner was arraigned before him on a warrant issued by Commissioner Epstein on October 6th, 1958.

There is no complaint dated October 6th.

There might have been a date of October 6th at one time, but it is gone over and the only date that appears before us now is October 15th.

Now, your Honor, this application was made prior to the filing of the indictment, and of course, under our law it is permissible and therefore in cases of this sort it is not necessary, as sometimes the Court does, to deny an application without prejudice so that the trial Court could pass upon it because in matters of this kind it is appealable as a matter of right in the Court of Appeals.

I would like to discuss with your Honor the complaint in this case.

The complaint is made by Agent Costa and looking (6) in the affidavits which are on file in this Court, we find that Agent Costa was not the agent that was directly involved in the purchase of the narcotics because it was Agent Moynahan who says that on August 26th he purchased some narcotics from one Samuel Panzarella, and on September 10th that he purchased these drugs from Samuel Panzarella.

In his affidavit he also states that he had a conversation with Panzarella.

The petitioner was not present at the time of the sale.

Moynahan never spoke to the petitioner. All he says in his affidavit is that he saw Panzarella and the petitioner have conversations prior to the time of the sale, and they never saw anything passed between the two of them.

Now, Agent Costa testified in his affidavit or allegations in his affidavit that he saw Panzarella and the petitioner have conversations, and Panzarella going to the petitioner's automobile. He never saw anything passed.

He was not present at the actual sale and never had a conversation with Samuel Panzarella.

So we find that instead of Moynahan, who is the (7) direct participant in these transactions, making the complaint, Agent Costa does.

The Court: Was there any accompanying affidavit by Moynihan?

Mr. Lewis: Nothing at all, that is one of the reasons that this is defective.

In looking at the complaint we find that Costa states upon information and belief there is no direct knowledge in this complaint, upon information and belief that the defendants, DiBella and Panzarella sold some drugs and the usual allegations of the statute.

Then he says that the source of his information and the grounds of his belief are deponent's personal observations in this case.

It doesn't tell us what the personal observations are.

Now, I am using their affidavit because it is not necessary to have a hearing in this case because we have all the evidence in the affidavit.

If we look at the affidavit which we don't have to consider because we are only bound on what appears in the complaint upon which the commissioner issued his warrant, he says: Deponent's personal (8) observations.

What were they?

Nobody knows them.

For the Commissioner to issue a warrant based upon this would be one based on conjecture, surmise and suspicion; but we do know when we look at the affidavit that all that the agent, Agent Costa, had was an observation that he saw the petitioner and Panzarella meet on two different occasions; Panzarella going to the petitioner's automobile, assumes they had a conversation, that Panzarella left and then later on Panzarella met with Agent Moynahan.

I say to your Honor that—

The Court: All these various incidents you just referred to occur on the same day, in succession?

Mr. Lewis: Yes, sir; but they do not appear in the complaint and the Commissioner can only be bound upon what appears in the complaint.

I am giving the Government every benefit of doubt and showing you what appears in the complaint, that Costa, all he had was the people under surveillance. He never saw the petitioner give him (9) anything, never saw anything passed between the two of them; that in his own affidavit it shows that petitioner was not persent at the time of the sale.

He never had a conversation with Panzarella.

The Court: Any statement of the background of those involved in it?

Mr. Lewis: No, your Honor.

Perhaps that is one of the reasons why Commissioner Abruzzo denied the application for a search warrant.

As to deponent's personal observations, that is merely conclusory in nature. It means nothing.

It says nothing and it doesn't have anything upon which the Commissioner could predicate a warrant upon.

Then it says the statement of Panzarella and we look at the affidavit and we know that he never got any statement from Panzarella but Agent Moynihan did and then we have to go back once again to the complaint.

What were the facts that were given to Agent Moynihan?

It doesn't appear here.

What were the facts, what were the statements?

(10) Now, on what can the Commissioner perdicate a warrant of arrest?

Upon a conclusory allegation, statement of Samuel Panzarella?

Now, our law is wisely set, and an agent may be satisfied with what he says but the United States Commissioner is the one that must be satisfied because the agent could have all of the good faith in the world but that may not establish probable cause as a matter of law.

The Commissioner is the first judicial officer that passes upon an application and he must be satisfied by inquiry that there is probable cause and I say to your Honor looking at this right now, all we have got is a statement of Samuel Panzarella, without any facts, nothing to indicate what Samuel Panzarella said.

Now, in his affidavit Costa states that he was told by Moynahan what Panzarella said to him.

Now, in the Draper case, and I will come to that in a little while, there is an indication that hearsay evidence is permissible on an application for a warrant because you don't need the same quantum of proof in applying for a warrant as you (11) do in establishing guilt beyond a reasonable doubt; but our courts have never held that you can get a warrant based upon hearsay, upon hearsay.

It wasn't that the informant told Costa, but the informant told Moynahan then who told Costa and that is like an inference upon an inference, and certainly the law has never been extended to encompass a case like that.

In fact, the case I cite in my memorandum of law, United States against Lester, 21 F. R. D., 376, one agent by the name of Edwards had the knowledge to make the complaint. He couldn't be in town at the time an application was made for this warrant, so he told it to a fellow agent, and that fellow agent made the application for the warrant, and the Court said: Since it was stipulated that Agent

Sweeney who made the complaint to the United States Commissioner did so on information received and not on personal knowledge, I think that the arrest warrant is invalid.

Now, the last sentence says that the source—

The Court: Is this search made on the basis of the arrest you claim?

(12) Mr. Lewis: Yes.

The Court: Was the search made immediately after the arrest?

Mr. Lewis: Yes.

Definitely.

We will come to that.

I want to do it chronologically. This is a very important motion.

I have put in two months of research on this.

Then the officer says the source of the deponent's information and grounds of belief are otherwise in this case and record of the Bureau of Narcotics which means nothing, and it has been condemned time and time again by our courts, which state that an allegation to that effect conveys no information whatsoever.

Now, the law has been well settled, Judge, and when an agent states, and I have got one case here, the source of the deponent's information and grounds of his belief are an investigation conducted by him in the course of his official duties, Judge Rifkind of Southern District in granting the motion to suppress states:

> "Such a complaint will not support a warrant (13) of arrest."

United States versus McCunn, 40 F. 2nd, 295, a Government agent swore to a complaint asking for the issuance of

a warrant of arrest, alleging that the sources of his information and the grounds of his belief were official investigations made by the agent in his official capacity.

Judge Bondy in granting the motion to suppress said:

> "To enable a committing magistrate to determine whether there is probable cause for the issuance of a warrant, the sources of the information and the grounds of the belief must be stated with sufficient definiteness to enable him to determine whether a warrant should issue.
>
> "The warrant accordingly was issued without the establishment of probable cause and the arrest and search and seizure incidental thereto must be held to be illegal."

And he cited Judge Bradley, who was then sitting as a Circuit Court Judge who eventually became a Judge in the United States Supreme Court, and that case is the matter of Rules of Court, it is a rather famous case, and Judge Bradley said:

> (14) "An affidavit made by an officer who, upon the relation of others, whose names are not disclosed, swears that upon information, he has reason to believe, the person charged to have violated the law does not meet the requirements of the Constitution.
>
> "In other words, the magistrate should have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself by personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

In the Court of Appeals in this Circuit it was held to justify the issuance of a warrant complaint must show probable cause stating the probable cause of the issuance, and the names of persons of affidavits that were taken in support of it.

Weinberg versus United States, 126 Federal 2nd, 1004.

U. S. versus Kaplan, 286 Fed. 963.

It was held, an affidavit for a warrant should state the particular grounds for probable cause for its issuance, and the names of the persons whose affidavits or depositions have been taken in support (15) thereof.

The Court: May I suggest that in view of the fact that I am going to read your memorandum that you don't read any more of it.

Mr. Lewis: I just want to give you a couple.

United States versus Dolan, 113 F. Fed. 757, he talks about the responsibility of the United States Commissioner, that he is the first judicial officer responsible for the warrant.

He says in the discharging of this task a frequent difficulty with which a Commissioner will find himself confronted arises when the complaint alleges, as I think it probably may, facts essential to the offense which are essentially the conclusions or inferences of the complaint from underlying facts.

> "The Commissioner should not accept a complaint as instituting a criminal prosecution until by examination under oath of at least one witness he finds probable cause for believing the existence of one or more underlying facts from which in their context the ultimate reference might be reasonably made."

I say it was incumbent upon Commissioner Epstein when he had a complaint like this which was devoid of all facts, to make an inquiry and to say (16) to the agent, upon which do you base your allegations, what are the facts, have you got an affidavit of the informant, what do you know of your own personal knowledge, is the informant in court?

In this particular case, Commissioner Epstein did nothing and he has before him a complaint which states no facts whatsoever.

As a matter of fact, your Honor, I say to you, based upon many of the complaints that I have seen, to me this is about the most barren complaint that I have ever encountered because there is nothing that Commissioner Epstein can say, this establishes probable cause.

Another famous case, United States versus King, 32 Fed. 2nd, 793, the Court said:

> "A complaint not based upon the complaints and personal knowledge and unsupported—"

The Court: All of this is cumulative.

I have asked you not to read any more of them.

They cover the same point which you have already stressed.

Mr. Lewis: In a recent case, too, Giordenello versus United States, 357 United States, 480, this is one of the latest cases on the subject, our (17) Supreme Court granted certiorari to consider petitioner's challenge to the legality of his arrest, and the admissibility of evidence seized from his person at the time of the arrest.

It seems that an agent by the name of Finley of the Federal Bureau of Narcotics obtained a warrant for the arrest of petitioner from a United States Commissioner,

based on a written complaint, sworn to by Finley which read in part:

> "The undersigned complainant (Finley) being duly sworn, deposes and says:
>
> "That on or about January 26th, 1956, at Houston, Texas, in the Southern District of Texas, Vito Giordenello, did receive, conceal, et cetera, narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation in violation of Section 174, Title 21, and the complainant further states that he believes that—" (There are names that follow)— "are material witnesses in relation to the charge."

Petitioner challenged the sufficiency of the warrant on two grounds:

1. That the complaint on which the warrant was issued was inadequate because the complaining (18) officer, Finley, relied exclusively upon hearsay information rather than personal knowledge in executing the complaint.

2. That the complaint was defective in that it in effect recited no more than the elements of the crime charged.

The Court said, it appears from Finley's testimony at the hearing on the suppression motion that until the warrant was issued, Finley's suspicions of petitioner's guilt derived entirely from information given to him by law enforcement officers and other persons in Houston, none of whom appeared before the Commissioner or submitted affidavits.

Now, that more or less bears out the other cases that I have stated to your Honor.

Then they cite the Constitution—

The Court: What disposition did the Court finally make?

Mr. Lewis: I say—"The purpose of a complaint is to enable the Commissioner to determine whether the probable cause required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause.

> (19) "He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

The Court held: "When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed.

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any source for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The Court further held:

> "That procedure in this case was illegal and that the seized narcotics should not have been admitted in evidence."

Then the later case in this subject is Draper versus United States, 358 U. S. 307.

In the Giordenello case the Court made this very pertinent observation:

(20) "We need not decide whether a warrant may be issued solely on hearsay information, for in any event we find this complaint defective for not providing a sufficient basis."

So there is left open the question of hearsay evidence, but only hearsay evidence is submitted.

Now, the Draper case, an experienced Federal narcotics agent by the name of Marsh, was told by one Hereford, who had been engaged as a special employee of the Bureau of Narcotics at Denver, for about six months, and from time to time gave information to Marsh regarding violations of the narcotics laws, for which he was paid small sums of money by Marsh and whose information Marsh had always found to be accurate and reliable, that the petitioner Draper was peddling narcotics in the City.

This conversation took place on September 3, 1956.

Four days later, on September 7th, 1956, Hereford told Marsh that Draper had gone to Chicago and that he was going to bring back three ounces of heroin either on September 8th or 9th, and would return to Denver by train.

(21) On September 9th, Marsh went to the railroad station and saw a man fitting the description that Hereford had given him, wearing the precise clothing described by Hereford, and walking in a fast manner as Hereford had said petitioner habitually did.

On September 8th, Marsh went down there to find out whether or not Draper had arrived, and he didn't show up and he went back to the railroad station.

He had been given a very detailed description of the clothing that Draper would wear and that he walked in a fast manner, and that he would have a certain type of briefcase, and so he went down on September 9th.

The agent saw a man dressed just the way it had been described to him, walking in that particular gait and also carrying this particular briefcase.

He went over to him and apprehended him and found narcotics.

The Court said:

> "The crucial question to be decided was whether knowledge of the related facts gave Marsh (22) probable cause within the meaning of the Fourth Amendment, to believe that petitioner had committed or was committing a violation of the narcotic laws."

If it did, the arrest though without a warrant and the subsequent search was lawful and the motion to supress was properly overruled.

The Court: Didn't the Court sustain that arrest?

Mr. Lewis: Yes, and I will tell you why, your Honor.

They said that the information given to the narcotics agent by the special employee might have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duty had he not pursued it.

The Court: And it was apparently accurate because the proper man was seized.

Mr. Lewis: And when pursuing that information he saw a man having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag alight and start to walk at a (23) fast pace toward the station exit.

Marsh had personally verified every facet of information given to him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag.

And surely, with every other bit of Hereford's information being thus personally verified, Marsh had reasonable grounds to believe that the remaining unverified bit of Hereford's information—that Draper (petitioner) would have the heroin with him—was likewise true.

In our particular case, Judge, there is nothing before the Commissioner to show that Panzarella was a reliable informant.

There are no facts to verify that which Panzarella may have said in his statement because there are several cases which hold and which follow the Supreme Court where it has been well settled law that information received from an outside source however sufficient its contents might be will not suffice to show probable cause unless such source is believed to be reliable, or unless it has substantial verification or supplementation in facts (24) personally known to the officer or officers.

The Court: Wouldn't it be that one of the two agents, either Costa or Moynahan, would have sufficient confidence in his fellow agent to believe what he had said to him?

Mr. Lewis: If you can show me that in this complaint, Judge.

The Court: I haven't seen it.

Mr. Lewis: I read it to you.

All he says, a statement of Panzarella.

He doesn't state what the statement is.

The Draper case said that Hereford may have been hearsay information to Marsh, but coming from one who is employed for that purpose, et cetera, et cetera.

In other words, he should have told him that this Panzarella is a reliable informant, or commissioner, now we are going to give you facts which will verify that information or which will supplement it.

You have nothing here.

All you have is a barren assertion.

The Court: Isn't this determination of the reliability of this informant a discovery after the (25) fact?

Mr. Lewis: No, Judge.

The fact that you make an arrest and you discover narcotics does not make an invalid or illegal arrest or make the search legal if it is an illegal arrest.

The Court: I am going to give Mr. Stewart a chance to argue.

You have had a little more time than what we had set.

Mr. Lewis: Just one more thing, Judge, there was a motion made before Judge Byers on June 30th, 1959; it is the same sort of a matter.

The petitioner there based his motion upon the Giordenello case, but Judge Byers held that he felt that the Draper case applied in that case, and here is the difference in the draftsmanship of the complaint and why this application must be granted, because the Government in that case said:

After they repeated the elements of the crime, they say that the source of your deponent's information and the grounds for his belief are the statements made by Arnold Victor Horgensen and George G. Giordano, that the above named defendant (26) participated with them in the robbery of the above-described bank as well as the investigations of agents of the F. B. I. at said bank and elsewhere.

Judge Byers said:

> "The statement upon which Jenkins relied in making the foregoing affidavit was that of the two persons who participated with the defendant in the commission of the above robbery.

"In view of this, that circumstance is clearly to be distingushed from the matter considered in the cited case.

"A later decision which may be consulted is Draper versus United States.

"Being of the opinion that the information upon which Jenkins relied was such that if he had failed to act—"

The correct name is Jorgensen.

"—upon it he would have been derelict in his duty, the motion is denied."

Now, in our particular case all they have got is this bare assertion, a statement of Samuel Panzarella, but what the facts are in the statement we do not know.

The Court: I will hear Mr. Stewart.

(27) Mr. Stewart: First of all, I would like to raise this point, your Honor, that in the motion papers of DiBella moving to suppress the evidence seized, there is first of all no allegation that DiBella, that he is the owner of the items seized.

The items seized involved first of all over a pound of heroin, some eighty grams of cocaine plus scales and cutting equipment, and in addition some eight thousand, six hundred seventy-five dollars which was seized in cash when the defendant DiBella admitted it was the proceeds from his narcotics traffic.

I mention that first, your Honor, because I don't believe that he could move to suppress evidence seized when he does not allege that he is the owner of the items which the Government picked up at the time of the arrest.

The Court: Do you have a case to support that?

Mr. Stewart: I believe the Lester case does.

Mr. Lewis: Why don't you read this paragraph to the Judge?

Mr. Stewart: Yes, I will.

"On or about March 9th, 1959, agents of the (28) Federal Bureau of Narcotics came to my apartment and after exhibiting to me a warrant for my arrest dated October 15th, 1958, proceeded to make a general exploratory investigation and seized said narcotics and in addition thereto a suitcase containing mscellaneous papers and my passport—"

The Court: You mean he should have said that this was all my property?

Mr. Stewart: Yes.

I think there is certainly a presumption that the fact it was found in his apartment—

The Court: Well, those are matters which are reserved for the trial and not for the motion.

Mr. Stewart: The Government's contention is really twofold, your Honor.

First, that under the present state of the law, the complaint which is based upon information and belief and personal observations by the deponent is in all probability valid and that in any event the agent actually making the arrest, Agent Costa, had very definite probable cause to make that arrest at the time he did so.

The Court: What was the basis of this, the information upon which probable cause would be (29) spelled out?

Mr. Stewart: May I sketch out the facts?

This investigation was conducted primarily by two agents, Agent Costa and Agent Moynahan.

The investigation was predicated upon the belief that

Mario DiBella had for a period of some years been wholesaling narcotics out in Queens, that one of his customers was a man by the name of Panzarella.

Accordingly Agent Moynahan made contact with Panzarella and arranged for a purchase of an ounce of heroin on August 26th.

At the same time that the meeting was set up with Panzarella and his connection who he later found to be Mario DiBella, Agent Costa covered the premises which DiBella lived in.

Now, Panzarella told Agent Moynahan that before he could sell him this ounce of heroin he had to call his connection.

He then made a phone call to DiBella's home in the presence of Moynahan and arranged for a certain date, a certain hour where they were to meet out in Jackson Heights.

Moynahan went with Panzarella out to this (30) particular location at that point and Panzarella left Moynahan and went out to meet his connection.

At the same time Costa was observing the DiBella apartment and saw DiBella come out of his home, get into his car and drive down and meet Panzarella. They drove for a block or two in DiBella's car and Panzarella then leaves the vehicle and goes to Agent Moynahan where Costa sees him give him a package.

These are Costa's personal observations.

The Court: Incidentally, are any of the details to which you referred contained in the affidavit which was submitted in support of the application for the warrant?

Mr. Stewart: Those details were not, but they were brought before the Commissioner in the Government's application for a search warrant.

Those facts were set forth in two affidavits, one from Costa and one from Moynahan in support of a search warrant on October 6th, which was denied for failure to show the time concerned; but now the narcotics in fact are—

Mr. Lewis: Your Honor, I am sorry to interrupt, but there were two different commissioners involved here, so the facts couldn't have been (31) brought before Commissioner Epstein.

The Court: You said that.

You told me that Commissioner Abruzzo had denied the application for a warrant.

Mr. Stewart: That is right, sir.

He denied it.

Now, a second purchase was arranged for.

The Court: Incidentally, is there any significance in the change in date in the affidavit from the sixth, which happens to be the date on which application for a warrant had been denied, and the 15th when the affidavit was submitted in support of the application for a search warrant?

Mr. Stewart: It happened this way, and it is a clear case of inadvertence.

There was originally an application for a search warrant in October, October 6th; at the same time arrest warrants were prepared.

The Court: Was it the same affidavit which was just resworn?

Mr. Stewart: No, sir.

When the search warrant was denied arrest warrants were sought on November 15th, but the search warrant had already been prepared at the same time (32) the application for the search warrant—that is, the arrest warrants had been prepared at the same time application was made for the search warrant.

The Commissioner noticed the date as far as the complaint is concerned, and apparently marked it over, he didn't change it over the arrest warrant.

I don't think that it is terribly significant.

I think it is a clear case of inadvertence.

I would like to check into it further.

The Court: Is reference made to the affidavit by a reference to the name of the affiant, and if not to the date of the affidavit because I would be inclined to think that if that be so that it was an inadvertence.

The point that was raised is one, and a technical one of three or four different points in support of this argument—

Mr. Stewart: You mean in the search warrant, is the reference made to the particular affidavit?

The Court: Yes.

Mr. Stewart: I don't believe there is.

I shall check at once into it.

(33) The Court: The warrant of arrest refers to an incident which occurs on September the 10th, and that is the date alleged to have been the date of the occurrence in the accompanying affidavit.

Mr. Stewart: Yes.

In addition to the events of the sale of heroin by Panzarella, after having received it from DiBella on August 26th, your Honor, there was a second purchase by Agent Moynahan.

This took place on September 10th, 1958, some two weeks after the first purchase.

On September 10th, essentially the same procedure was followed with this exception,—that Panzarella told Agent Moynahan more about his connection and his background, and how long he had been in the business identifying him as the defendant, DiBella.

There again Panzarella called DiBella, set up the appointment.

The same observation technique was followed. Agent Costa watched DiBella's home, watched him leave his apartment, come out, meet Panzarella, Panzarella and DiBella would then go together for a way, and then Panzarelia would go to Agent Moynahan and (34) give him a package which later turned out to be heroin.

The Court: Were these facts or any of them officially brought to the attention of Commissioner Epstein at the time a warrant was issued?

Mr. Stewart: You mean verbally?

The Court: You said officially, apparently they weren't in the affidavit because Mr. Lewis says they were not.

Were they questioned by the Commissioner?

Was any of this information brought to the attention of the Commissioner, Commissioner Epstein, so that they may have been considered by him in satisfying himself that there was probable cause?

Mr. Stewart: I would have to check on that. I don't recall.

There was some discussion, whether it covered the probable cause question or not, I cannot say. I know there was a discussion as to the need for secrecy in the issuing of the warrant, and the reasons for that I believe were given.

I would have to check with the agents who were present at that time.

Of course, the search warrant was sought and (35) the search warrant application was denied.

There was a lapse of time between the issuance between the arrest warrants on November 15th, 1958, to March 9, 1958, before the actual arrest was made.

This was done in order to try to find out who else was

associated with the man DiBella in the narcotics traffic; and that not proving successful they went ahead and arrested him in the apartment using the old warrant that they had outstanding for his arrest.

The Court: Then using the arrest for a basis for making a search of the premises?

Mr. Stewart: Your Honor, that is another point that I would like to come to now.

When they went up to the apartment on March 9th, they identified themselves as agents from the Bureau of Narcotics, and Costa identified himself, showed his credentials.

The door was opened by Jean DiBella, a stepdaughter of the defendant.

Prior to the time that they hit the apartment they had been in a neighboring building and they had seen DiBella sitting in his living room, (36) so that they knew he was in the apartment when they went there.

When Jean DiBella opened the door and the agents identified themselves, she opened the door and ushered them in, motioning with her hand to come into the apartment. There was no threats or force to get into the apartment. They asked for her father and she said that he was in the living room.

They went into the living room and showed him their credentials and showed him a copy of the warrant of arrest.

The Court: Was this shown after they had already gained admittance voluntarily on the part of the occupants?

Mr. Stewart: Yes.

They identified themselves first and asked to speak with Mr. Mario DiBella. They then showed him the arrest warrant. The arrest warrant was not used to gain access to the apartment.

DiBella and his wife both state this, and read through the warrant which was shown to them.

At that point one of the agents who had been outside of the building came in and asked the other agents in DiBella's presence whether DiBella had been (37) informed as to why they had been there.

DiBella said, you don't need to tell me, I know why you are here.

He said, all the stuff is in a certain closet, a closet in the bedroom, and he went to that closet and pointed to it and went to open it.

The agent instead opened a closet door, the bedroom was off the living room, opened the closet and saw the suitcase there. He took it out and opened it up and put it on the bed and that was the suitcase that contained the pound of heroin and cocaine and cutting equipment.

They then asked him whether he had any valuables which should be secured and he then went out and produced a strongbox containing $2,675.00 in cash.

After they determined that the suitcase contained heroin and cocaine and DiBella had then produced this money they went ahead and did conduct a search of the apartment, but that came after he had voluntarily pointed out to the agents that he did have narcotics right there in his apartment.

The Court: You say after they satisfied themselves that it was narcotics. Was this a field (38) test—was a field test performed or by his statement alone?

Mr. Stewart: There was a field test. They did conduct an examination. I am not sure whether it was a field test of the goods in the suitcase.

So that first of all, I would contend that the complaint is in all probability valid and that the warrant is valid and

that in any event, Costa had within his mind those facts necessary to constitute probable cause to arrest DiBella for the two prior sales.

The Court: Having the facts in his mind, is that adequate for the issuance of the warrant?

Mr. Stewart: For an arrest warrant, your Honor, if they were in his mind, they should have been set forth in the complaint, but whether the complaint sets it forth or not, even assuming that the warrants were to be invalid, Agent Costa still had probable cause to effect that arrest on the basis of what he knew about these two prior sales.

Stretching it to the ridiculous point, if for any reason a man like DiBella should make two sales of narcotics in succession and through inadvertence or an invalid issuance of a warrant for (39) arrest an agent should have the knowledge in his mind that he had made these sales and the ability to prove it, it would give him immunity for an arrest for the rest of his life merely by virtue of the issuance—

The Court: If he had enough knowledge justifying arrest why did he need a warrant?

Mr. Stewart: He didn't need a warrant in this case.

The only reason that it was given to him, because he asked for one as a matter of bureau policy.

He could have gone right out there and the narcotics law provides that it is perfectly permissible for the agent to go out there to make the arrest without a warrant, provided that he has probable cause to believe that he has committed a crime.

I am very sorry that the warrant was ever issued, but it is too late.

The Court: Mr. Stewart asked for time to reply to your memorandum.

How much time do you want?

Mr. Stewart: I would like ten days, if your (40) Honor would allow me.

The Court: We will give you to the eighth of September.

You file your reply brief with the Clerk and serve a copy to Mr. Lewis.

I want to give him an opportunity, if he feels it is necessary, to reply.

I will give him until the 11th to do it.

Mr. Stewart: The only other point that I want to make is this, your Honor, that the Giordenello case which Mr. Lewis relies on where they struck down a seizure made incidental to an arrest with an arrest warrant, specifically said that if there were a new trial that the Government was not to be foreclosed from showing that the agent who made the arrest had probable cause to do so.

If I may, I will read to you that particular portion of it—

They didn't allow them to—

The Court: How would that in any way influence me in my determination of this motion regardless of what my position would be?

Any order to be entered on this motion is appealable and in the second place, on a trial of the case (41) the Court held that the agent involved despite the fact that the warrant may have been improperly issued would have the right to testify that he made a proper arrest.

That would come upon the trial.

Mr. Stewart: I merely wish to point that out, that they left that open in the Giordenello case, and the Draper case—

Mr. Lewis: Your Honor, that is a common rule of law.

I just want to say this, whether or not he had probable

cause to make the arrest without the warrant had nothing to do with this motion.

They got the warrant, they arrested the man, pursuant to the warrant, they arraigned him before Commissioner Schiffman, pursuant to the warrant, and the returned part of it based on the warrant the agent said, Agent Costa says, I brought this man into court based on this warrant.

This is an interesting point here where you use a warrant to make an exploratory search is to be condemned—

The Court: Who determines whether it was used for a pretension?

(42) Mr. Lewis: That is for you to determine.

October, 1958, the warrant was issued, and the agents had knowledge where the man lived and they could have arrested him within a day or two, and they waited until five months' time had elapsed, and they didn't go there to make an arrest, they went there to make an exploratory search to discover if there was narcotics.

The Court: That does not conform to Mr. Stewart's explanation on why there was a hiatus.

He said that they were trying to get others involved in the illicit operation.

Mr. Lewis: That is for your Honor to decide, because there is a Supreme Court case right on that particular point, where they condemn an exploratory search using a warrant of arrest as a basis for it.

The Court: All right.

All papers by September 11th.

* * * * *

Opinion of Rayfiel, *U.S.D.J.*

(92) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 2225

[SAME TITLE]

Appearances:

JEROME LEWIS, ESQ.,
Attorney for defendant Mario DiBella,
For the Motion.

HON. CORNELIUS W. WICKERSHAM, JR.,
United States Attorney.
By CHARLES L. STEWART, ESQ.,
Assistant United States Attorney,
In Opposition.

RAYFIEL, *J.*

The defendant, Mario DiBella, moves under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress all evidence seized in his apartment at 35-15 80th Street, Jackson Heights, Queens County, New York, on March 9, 1959 by agents of the Federal Bureau of Narcotics, as well as any and all evidence gleaned herefrom, on the ground that the search and seizure was unlawful, being violative of the Fourth Amendment of the Constitution of the United States and of Rules 3 and 4 of said Rules.

(93) The defendant bases his motion on the following three grounds:

1. that the warrant of arrest was invalid because the complaint on which it was based did not state facts sufficient to show probable cause;

2. that his arrest under said warrant was used as a pretext to make an exploratory search of the defendant's apartment; and

3. that the warrant was invalid because it bore the date October 6th, 1958, while the complaint on which it was based was dated October 15th, 1958.

As to the third ground, it is palpable that the error in date was inadvertent. Both the warrant and the complaint on which it was based, were *originally* dated October 6th, 1958. The date on the complaint was changed in ink to October 15th, 1958 when it was sworn to before Commissioner Epstein. The date on the warrant, however, was not changed and was thus signed by the Commissioner. This was clearly an oversight and should and does not affect the validity of the warrant, which obviously, was issued on October 15th, 1958. As a matter of fact defendant's counsel, in the statement of undisputed facts contained in his brief, alleges "1. That on the *15th* day of October, 1958 a warrant was issued . . . " (Emphasis supplied.)

As to the failure of the complaint to state facts showing (94) *probable cause.*

The complaint alleges on *information and belief* that "the defendants, *Mario DiBella* and *Samuel Panzarella*, did on September 10, 1958, at Jackson Heights, Long Island, New York, within the Eastern District of New York, unlawfully sell, dispense and distribute a narcotic drug, to wit: approximately one ounce of heroin hydrochloride, a derivative of opium. . . . "

The following paragraph states "That the source of your deponent's information and the grounds for his belief are *your deponent's personal observations in this case*, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics." (Emphasis added.)

Doubtless the complaint was inexpertly drawn. It alleges, *on information and belief*, that the sale of the heroin took place on September 10th, 1958, and then goes on to say that the *source* of the complainant's information and *grounds* for his belief, are, among other things, *his own observations*. Obviously, if the sources of his information were his own observations, then he had *personal knowledge* of the facts.

I have read the statements of Agents Costa and Moynihan which are set forth in Appendix B and C, attached to the affidavit submitted in opposition to this motion by Assistant United States Attorney Charles L. Stewart. These statements were originally (95) attached to an application for a search warrant made before Commissioner Abruzzo, who denied the same: I have considered them as having been submitted in opposition to this motion.

Agent Moynahan's statement alleges that he had met one Samuel Panzarella, a co-defendant of DiBella, who offered to sell him heroin, the sale to take place at 8:00 A.M. on August 26, 1958; that he met Panzarella in Manhattan at 6:00 A.M. on that day and was told by him that he wanted to call his source of supply, whereupon Panzarella made a telephone call, after which he and the agent drove to 79th Street, north of Roosevelt Avenue, in Jackson Heights, Queens, New York, where they parked; that Panzarella then left the vehicle, walked to 79th Street and 37th Avenue, and entered a green Chrysler automobile bearing New York license number 6971 N E; that he observed Panzarella leave

that vehicle several minutes later at 79th Street and Roosevelt Avenue and return to the car in which he, the agent, was waiting, after which Panzarella handed him a glassine envelope containing a white powder, which subsequent tests proved to be an ounce of heroin hydrochloride. That on September 10th, 1958 a similar series of events occurred: at 9:30 P.M. on that day he met Panzarella in Manhattan, was told by him that he would have to go to Jackson Heights to meet his source of supply, and after Panzarella made a telephone call they both went to 74th Street (96) and Roosevelt Avenue; Panzarella then left the agent, met the defendant Mario DiBella, walked with him from 74th Street to 37th Road and then returned to the agent; they both drove back to Manhattan, and enroute Panzarella handed him a glassine envelope containing heroin hydrochloride, and stated to him that DiBella was his source of supply and had supplied the heroin whisch has been sold to the agent on August 26th, 1958 and September 10th, 1958.

Agent Costa's affidavit alleges that on August 26th, 1958, at 7:30 A.M. he saw the defendant Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, enter his Chrysler automobile, license number 6971 N E, drive to 37th Avenue and 79th Street where he met Panzarella, who entered the car, and DiBella then drove to Roosevelt Avenue and 79th Street, where Panzarella left the car and walked to 78th Street, where he met Agent Moynihan, to whom he handed a small envelope the contents of which later tests showed to be heroin hydrochloride; that at 11:00 P.M. on September 10th, 1958 he observed DiBella leave Apartment 42 at 35-15 80th Street, Jackson Heights, walk to Roosevelt Avenue and 74th Street, where he met Panzarella, and then walked with him to 76th Street near Roosevelt Avenue, where they separated, after which Panzarella

met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he stated he (97) had obtained from DiBella.

It is evident from these statements that Agent Costa had personal knowledge of the events which led to DiBella's arrest. He so stated in the affidavit which he submitted in support of the application for the warrant which was issued by Commissioner Epstein on October 15th, 1958 and executed on March 9th, 1959.

The facts in this case are infinitely stronger than those in *Giordenello* v. *United States*, 357 U. S. 480, cited by the defendant in his brief. There the names of the witnesses were left blank in the complaint on which the warrant was issued, and the agent testified that when the warrant was issued "his suspicions of the petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits" (p. 485). The Supreme Court there held that this complaint was "defective in not providing a sufficient basis upon which a finding of probable cause could be made."

In the case at bar Agent Costa had had the defendant under observation. He saw him meet Panzarella on two occasions, after which the latter made sales of heroin to Agent Moynihan. The complaint names Panzarella as a person who made statements in the case, and alleges that the sources of the agent's information were his "personal observations in this case, the statements of (98) Samuel Panzarella, and other witnesses in this case and the reports and records of the Bureau of Narcotics." The facts in the case at bar are similar to those in the case of *Lathem* v. *U. S.*, 259 F. 2d 393, where the Court said at page 398, "Here, it is clear that Slotnik had personal knowledge, based his charge on knowledge, not belief, and that the com-

plaint is an affirmative statement from an affiant with personal knowledge. Unlike the *Giordenello* case, the Commissioner could determine whether there was probable cause for issuance of the warrant. He did not have to accept a mere conclusion." In my opinion the complaint herein was sufficient and the warrant was properly issued thereon.

However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that DiBella had committed a violation of the Narcotics Acts sufficiently reasonable to justify his arrest without a warrant. Section 7607 of Title 26, U. S. Code, states that among others, Agents of the Bureau of Narcotics may "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested (99) has committed or is committing such violation."

In the recent case of *Draper* v. *United States*, 358 U. S. 307, an Agent of the Bureau of Narcotics in Denver arrested the defendant without a warrant after having been advised by one Hereford, a "special employee", that the defendant was peddling narcotics, that he had gone to Chicago to purchase heroin, and would return to Denver with it on September 8th or 9th, 1956. Hereford gave the Agent a physical description of the defendant and the clothes he was wearing, informed him that he would carry a tan zipper bag, and that he habitually walked fast. On the morning of September 9th the Agent saw a person answering that description and carrying a tan zipper bag, alight from an incoming Chicago train at the Denver sta-

tion and walk quickly toward the exit. The Agent, accompanied by a police officer, arrested defendant, searched him and found two envelopes containing heroin clutched in his left hand in his raincoat pocket. The defendant attacked the arrest and subsequent search and seizure as violative of the Fourth Amendment, in that the information given by Hereford to the Agent was hearsay and could not be considered by him in determining whether there was probable cause, and that the Agent's information was insufficient to meet the test of "probable cause" and the requirement that there be reasonable grounds for believing a violation had taken place."

(100) The Supreme Court rejected both arguments. It held, at pages 311 and 312, that *Brinegar* v. *U. S.*, 338 U. S. 160, had decided that there was "a large difference between the two things to be proved (guilt and probable cause), as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." 338 U. S. at 172, 173. The Agent, therefore, they hold properly considered Hereford's information, even though it was hearsay, in arriving at "probable cause."

The decision went on to say at page 313 "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar* v. *United States, supra,* at 175. *Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief*

that' an offense has been or is being committed. Carroll v. *United States,* 267 U. S. 132, 162." (Emphasis added.)

In the case of *United States* v. *Walker,* 246 F. 2d 519, Circuit (101) Judge Finnegan reviewed the whole field of the law respecting arrests without a warrant, and stated at page 527, "Reasonable ground then, is the litmus paper for testing validity of arrests without a warrant. Implicit in such test is the exclusion of arbitrary and capricious interference with individual freedom. Dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. Consequently organic law, reflected in the relevant statutes and Rules of Criminal Procedure interpose the judiciary between law enforcement officers and citizens by requiring, as normal procedure, application for warrants and the attendant opportunity for the judicial branch to pass on the question of probable cause. This constitutional insulation against infringing basic rights is removed only under classes of exigencies which have been judicially approved on review and now form a discernible pattern of instances, excusing law-enforcement officers for by-passing the requirement of having the judiciary first rule upon the question of probable cause. In those situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Rather than blind worship of cause alone, the law probes for the basis of the officer's action measuring it by an external standard. After all when an arrest without a warrant is classed as valid, it simply means such action is judicially tolerated as being within (102) constitutional bounds of reasonableness as officially or pragmatically defined as case-law. Fresh combinations of facts must necessarily be examined under the terms labelled 'probable cause' and 'reasonable grounds' for neither one is a static concept. But the criteria em-

bedded in each continues to be one that refuses approval for arrests without a warrant where an officer is stimulated by an *inkling only. For he must act as a man of reasonable caution. 'Suspicion' is an elusive word with a wide spectrum of intensities and courts must examine the facts underlying it rather than be deflected by the word itself.''* (Emphasis added.)

It is my opinion that the evidence in the possession of Agent Costa was more than sufficient to give him reasonable ground to believe that DiBella had violated the Narcotics Acts on August 26, 1958 and September 10, 1958, on both of which occasions he had *personally* observed him meet Panzarella immediately prior to the sales of heroin to Agent Moynihan, about which he was told by the latter, who is clearly a more reliable source of information than were the informers in the *Draper* and *Walker* cases, *supra*. Agent Costa could, therefore, have arrested the defendant DiBella without the warrant on March 9th, 1959.

The arrest having been properly made, I find that the search incident thereto was proper, and that the evidence resulting therefrom was not illegally obtained.

(103) The motion is in all respects denied, without prejudice, however, to a renewal thereof on the trial.

Settle order on notice.

Dated: November 4th, 1959

LEO F. RAYFIEL
United States District Judge

Order Appealed From

(104) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Motion having been made by the defendant, Mario Di Bella, for an order suppressing all evidentiary items seized by agents of the Federal Bureau of Narcotics on or about March 9, 1959, in the said Di Bella's apartment at No. 35-15 80th Street, Jackson Heights, Queens, New York, together with any and all information gleaned from said seizure, and said motion having come on to be heard on the 25th day of August 1959, before the Honorable Leo F. Rayfiel, United States District Judge, and after reading the Notice of Motion and Affidavits and Memoranda submitted in support of and in opposition thereto, and having heard Jerome Lewis, Esq., attorney for the defendant, Mario Di Bella, in support of said Motion, and Cornelius W. Wickersham, Jr., United States Attorney, by Charles L. Stewart, Assistant United States Attorney, in opposition thereto, and due deliberation having been had and the Court having rendered its opinion denying said Motion on the 4th day of November 1959, and in accordance with said opinion, it is hereby

ORDERED, that the said Motion is in all respects denied without prejudice, however, to a renewal thereof at the time of trial.

Dated: Brooklyn, New York
November 30, 1959.

LEO F. RAYFIEL
United States District Judge

Notice of Appeal

(105) UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 2225

In the Matter of the Application

of

MARIO DI BELLA

for an order suppressing all evidentiary items seized by Agents of the Federal Bureau of Narcotics on or about March 9th, 1959, in premises No. 35-15 80th Street, Jackson Heights, Queens, New York.

Name and Address of Appellant:

Mario Di Bella
35-15 80th Street, Jackson Heights
Queens, New York

Name and Address of Appellant's Attorney:

Jerome Lewis
66 Court Street
Brooklyn, New York

Offense:

Appellant charged with selling, dispensing and distributing a narcotic drug, to wit: heroin, in violation of Title 26 U.S.C. Section 4704 (a) and Ttle 18 U. S.C. Section 2.

Notice of Appeal

Concise statement of judgment or order, giving date, and any statement:

This is an appeal from an order of Hon. Leo F. Rayfiel, United States District Judge for the Eastern District of New York, dated November 30th, 1959, denying the appellant's motion to suppress all evidentiary items seized by Agents of the Federal Bureau of Narcotics in his apartment on the ground that the seizure was illegal and the search unlawful in violation of the Fourth Amendment of the United States Constitution and Rules 3, 4 and 41 (e) of the Federal Rules of Criminal Procedure. This motion was made prior to the filing of an indictment.

(106) The appellant is presently on bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated order.

Dated December 2nd, 1959

Jerome Lewis
Attorney for Appellant

[fol. 93a]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 349—October Term, 1959

Argued June 14, 1960

Docket No. 26049

MARIO DIBELLA, Appellant,

—v.—

UNITED STATES OF AMERICA, Appellee.

Before: Waterman, Moore and Hamlin,* Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Rayfiel, *J.*, denying a motion for the suppression of evidence obtained by means of an allegedly unlawful search and seizure. Affirmed.

Jerome Lewis, for appellant.

Cornelius W. Wickersham, Jr., United States Attorney, Eastern District of New York (Joseph J. Marcheso, Assistant United States Attorney, of counsel), for appellee.

[fol. 94a]

OPINION—November 23, 1960

HAMLIN, *Circuit Judge*:

Mario DiBella, appellant, appeals from an order of the District Court denying his motion to suppress certain evi-

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* Of the Ninth Circuit, sitting by designation.

dentiary items seized in his apartment by agents of the Federal Bureau of Narcotics on March 9, 1959, at the time of his arrest. The motion was made after arrest and arraignment of appellant but before his indictment.

On November 30, 1959, subsequent to his indictment, the motion was denied by the District Court, with leave to renew it at the time of trial. On December 3, 1959, appellant gave notice of appeal to this Court from the order of the District Court. There has as yet been no trial of appellant.

Initially, the United States, appellee, raises the question as to whether such an order is appealable.

Over a period of many years this Court has consistently held that where the application is made prior to indictment, as it was in this case, that a defendant may appeal to this Court from an order denying his motion to suppress. *United States* v. *Poller*, 43 F. 2d 911 (2 Cir. 1930); *Cheng Wai* v. *United States*, 125 F. 2d 915 (2 Cir. 1942); cf. *United States* v. *Klapholz*, 230 F. 2d 494 (2 Cir. 1956); *United States* v. *Russo*, 241 F. 2d 285 (2 Cir. 1957).

We hold the order made by the District Court in this case to be appealable.

The motion was argued before the District Court by counsel on either side and affidavits and counteraffidavits were presented for his consideration. From the showing there made, the following factual situation appeared. On October 15, 1958, one David W. Costa, a special agent of the Federal Bureau of Narcotics, presented to United States Commissioner Epstein in the Eastern District of New York a complaint praying for the arrest of appellant. This complaint stated:

> [fol. 95a] "That upon information and belief, the defendants, Mario DiBella and Samuel Panzarella, did on September 10, 1958, at Jackson Heights, Long Island, New York * * * unlawfully sell, dispense and distribute a narcotic drug, to-wit: approximately one ounce of heroin hydrochloride, a derivative of opium, which said heroin hydrochloride was not in or from an original package bearing tax stamps required by law * * *
>
> "That the source of your deponent's information and the grounds for his belief are your deponent's personal

observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

Upon the basis of this complaint Commissioner Epstein issued a warrant of arrest.

On March 9, 1959, the narcotic agents saw appellant sitting in his living room in his apartment. At 8:15 p.m. Agent Costa, with the warrant of arrest in his possession, went with other agents to appellant's apartment. It was nighttime. The agents rang the bell and the door was opened by appellant's stepdaughter. The agents identified themselves, showed her their credentials, and walked into the living room, where they identified themselves to appellant, showed him a copy of the arrest warrant, and placed him under arrest. A quantity of narcotics was found, which, together with other items, the agents seized.[1]

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[1] The foregoing facts are undisputed. The only substantial conflict in the affidavits concerns the circumstances of the search. According to the affidavit of the Assistant United States Attorney the agents asked DiBella if he would permit them to make a search of the apartment. Appellant then told one of the agents "I know what you came for. I have all the stuff in a suitcase in the closet. There's no use tearing the place apart." Appellant then took the agents to his bedroom where a suitcase was found in the closet, and opened. It contained approximately a pound of heroin, a quantity of cocaine, and certain paraphernalia used to "cut" the narcotics. Appellant then stated that this was all the heroin he had in his possession. Approximately $8,675 was found in the apartment, and appellant later admitted that this money represented profits which he had made in the sale of narcotics. Appellant also later admitted that he had voluntarily turned over the seized heroin to the agents at the time that they visited his apartment to arrest him.

An affidavit filed by DiBella's counsel presents a different version of the events following DiBella's arrest. According to this affidavit "About six agents remained in the living room with him and four others searched his apartment. He never consented to the search. He never left the living room. He never gave heroin nor money to the agents."

DiBella's affidavit is not contrary to either of the above affidavits but merely states that the agents, after exhibiting to him the warrant for his arrest, "proceeded to make a general exploratory examination of my apartment. They discovered a quantity of

[fol. 96a] In *Application of Fried*, 68 F. Supp. 961, consideration was given to the sufficiency of a complaint upon which a warrant of arrest was issued. There, the complaint, after alleging that the defendants had in their possession certain goods and chattels knowing the same to have been stolen, contained the following statement:

> "The sources of deponent's information and the grounds of his belief are an investigation conducted by him in the course of his official duties."

The Court there held "Such a complaint will not support a warrant of arrest. U. S. v. McCunn, D. C. S. D. N. Y., 1930, 40 F. 2d 295; United States ex rel. King v. Gokey, D. C. N. D. N. Y., 1929, 32 F. 2d 793; • • • United States v. Pollack, D. C. N. J., 1946, 64 F. Supp. 554; United States v. Ruroede, D. C. S. D. N. Y., 220 F. 210."

Recently the question of the sufficiency of a complaint to justify a warrant of arrest was considered in *Giordenello* v. *United States*, 357 U. S. 480.

[fol. 97a] The complaint in that case read as follows:

> "The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas • • •, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; • • •
>
> "And the complainant further states that he believes that .... are material witnesses in relation to this charge."

In striking down the complaint as insufficient in that case, the Court said:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any

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narcotics in my apartment and seized said narcotics and in addition thereto a suitcase, miscellaneous papers, my passport and divers other items."

Under either version it does not appear that the search of appellant's apartment was an unreasonable one.

sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The Court further said:

"Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it * * * ' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that ' * * * no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized,' of course applies to arrest as well as search warrants."

[fol. 98a] We hold that the complaint upon which the warrant of arrest was based was deficient in this case, and would not support the warrant of arrest which was issued under it. It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been committed was grounded on his "personal observations in this case, the statements of Samuel Panzarella, and other witnesses in this case, and the reports and records of the Bureau of Narcotics," but what other sources could there possibly be? Such a shotgun, all-encompassing enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless "other witnesses" or the unidentified "reports and records." The complaint is no better than that in *Giordenello* v. *United States*, and the warrant is invalid for the same reasons.

Appellee, however, contended in the court below (as it contends here) that regardless of any objection of appellant that the warrant of arrest was improperly issued, that

Agent Costa had probable cause to effect a valid arrest of appellant under the authority of 26 U. S. C. §7607, which states that, among others, agents of the Bureau of Narcotics may:

> "(2) Make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 4731) or marihuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

[fol. 99a] The District Court, in its opinion agreeing with the position of appellee, stated: "However, quite apart from the question of the propriety of the issuance of the warrant, Agent Costa had grounds for believing that Di-Bella had committed a violation of the Narcotics Acts sufficiently reasonable to justify his arrest without a warrant." To properly evaluate this contention, we shall examine some of the further facts that were presented upon the hearing to the District Judge.

It appears that on October 6, 1958, Agent Costa and another agent, one Daniel D. Moynihan, in an endeavor to obtain a search warrant each signed and presented to United States Commissioner Abruzzo an affidavit which set forth the knowledge each agent had from personal observation and from information received, concerning the activities of appellant in connection with possession and sale of narcotics.

These affidavits set forth in detail certain events occurring on August 26, 1958, and on September 10, 1958, from which it could be inferred that there was a sale of narcotics on each of those two occasions by appellant to the narcotics agents through one Panzarella. These affidavits are set out in full in a footnote.[1]

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[1] [AFFIDAVIT OF DAVID W. COSTA]

EASTERN DISTRICT OF NEW YORK, ss.:

DAVID W. COSTA being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2,

[fol. 100a] A search warrant was not issued by United States Commissioner Abruzzo, to whom the affidavits were presented, but the affidavits were presented to the District Judge for his consideration on the instant motion to suppress.

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and that he has been assigned since the latter part of July, 1958, together with Daniel D. Moynihan, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale not from the original stamped packages and not pursuant to any written order form in violation of the provisions of the Internal Revenue Tax Laws.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Upon information and belief, Mario DiBella rents apartment #42 at 35-15 80th Street, Jackson Heights, Queens, New York.

At 7:30 A.M. on August 26, 1958, I observed Mario DiBella leave the premises at 35-15 80th Street, Jackson Heights, Long Island, New York. DiBella walked to the street and entered his Chrysler automobile New York License No. 6971NE. DiBella drove to 37th Avenue and 79th Street, Jackson Heights, where he met one Sammy Panzarella, who entered the Chrysler automobile driven by DiBella. The two men drove to Roosevelt Avenue and 79th Street where Panzarella left the car. I observed Panzarella walk to 78th Street, where, upon meeting Agent Moynihan, Panzarella handed a small envelope to him. Later tests showed that this envelope contained heroin hydrochloride.

A second purchase of heroin from Panzarella was arranged by Agent Moynihan to be effected September 10, 1958.

At 11:00 P.M. September 10, 1958, I observed Mario DiBella leave Apartment #42 at 35-15 80th Street, Jackson Heights, New York and walk to Roosevelt Avenue and 74th Street where he met Panzarella. DiBella and Panzarella then walked to 76th Street near Roosevelt Avenue, where they parted company. Panzarella then met Agent Moynihan and sold him an ounce of heroin hydrochloride, which he claimed he had obtained from DiBella.

Upon information and belief, Mario DiBella has been a source of supply of heroin hydrochloride to Samuel Panzarella over a period of years; that on each of the two occasions described above, Mario DiBella left his apartment #42 35-15 80th Street, Jackson

In *Draper* v. *United States*, 358 U. S. 307, at 310, it was held that where a narcotic agent had "probable cause" within the meaning of the Fourth Amendment and "reasonable grounds" within the meaning of the Narcotic Control Act to believe that a person had committed or was com-

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Heights, New York and proceeded directly to meet Samuel Panzarella; that Samuel Panzarella then proceeded directly to Agent Moynihan and sold him a quantity of heroin hydrochloride.

That the source of your deponent's information and the grounds for his belief are the investigation and reports of Agents of the Bureau of Narcotics; the statements of Samuel Panzarella and other witnesses and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by David W. Costa on October 6, 1958.)

[AFFIDAVIT OF DANIEL D. MOYNIHAN]

EASTERN DISTRICT OF NEW YORK, *ss.*:

DANIEL D. MOYNIHAN being duly sworn deposes and says that your deponent is an agent of the Bureau of Narcotics, District No. 2, and that he has been assigned since the latter part of July, 1958, together with David W. Costa, an agent of the Bureau of Narcotics, to investigate the possible sale and possession of narcotics in the area of Jackson Heights, Queens, within the Eastern District of New York.

That he has reason to believe that on the premises known as Apt. 42, 35-15 80th Street, Jackson Heights, Queens, New York, within the Eastern District of New York, being a 5 room apartment leased to one Mario DiBella, that there is now being concealed a quantity of narcotic drugs, namely: heroin hydrochloride, a derivative of opium, which are contraband held in violation of law for the purpose of sale and that these drugs are not from the original stamped packages and not pursuant to any written order form, in violation of the provisions of the Internal Revenue Tax Laws.

The facts tending to establish the grounds for the issuance of a search warrant are as follows:

Your deponent met one Samuel Panzarella who offered to sell heroin to your deponent. At the time of the meeting, Samuel Panzarella and your deponent agreed to effect the sale of heroin to your deponent, this sale to be made on August 26, 1958 at 8 o'clock in the morning. At six o'clock in the morning on August 26, 1958 your deponent met Samuel Panzarella in

[fol. 101a] mitting a violation of the narcotics laws, he could make a lawful arrest. The Court there said, quoting *Brinegar* v. *United States,* 338 U. S. 160, 172-173:

"'There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and there-

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Manhattan. Samuel Panzarella stated that he wished to telephone his source of supply of heroin, and he thereupon made a telephone call. After the telephone call was completed, Samuel Panzarella stated to your deponent that delivery of the heroin would be made to your deponent at 8:30 A.M. that morning.

Your deponent then drove with Samuel Panzarella to Jackson Heights, Long Island and parked on 79th Street, north of Roosevelt Avenue. Samuel Panzarella left the vehicle at about 7:30 A.M. that morning and your deponent observed him walk to 79th Street and 37th Avenue and enter a green Chrysler, New York license #6971NE. Your deponent observed Samuel Panzarella leave that Chrysler several minutes later at 79th Street and Roosevelt Avenue. Samuel Panzarella then returned to the vehicle used by your deponent, and at 8:05 A.M. that morning Samuel Panzarella handed your deponent a glassine envelope containing a white powder which subsequent tests proved to be an ounce of heroin hydrochloride.

A similar pattern of events followed on September 10, 1958. At 9:30 in the evening of September 10, 1958, Samuel Panzarella and your deponent met in Manhattan, where Samuel Panzarella offered to sell your deponent another ounce of heroin. Samuel Panzarella stated that it would again be necessary to go to Jackson Heights to meet his "connection," and that he would telephone his "connection." Panzarella then made a telephone call at 9:40 P.M. on September 10, 1958. Your deponent and Samuel Panzarella went to 74th Street and Roosevelt Avenue, Jackson Heights, Long Island, New York. At 11:05 P.M. Samuel Panzarella left your deponent. Your deponent observed him meet Mario DiBella a few minutes later, and saw Mario DiBella walk with Samuel Panzarella from 74th Street to 37th Road. Samuel Panzarella returned to your deponent at 11:20 P.M. and your deponent and Samuel Panzarella then drove to New York City. En route, Samuel Panzarella handed a glassine envelope containing a white powder to your deponent, which powder was tested and found to be heroin hydrochloride.

Samuel Panzarella stated that DiBella was his source of supply of heroin and that DiBella had supplied the heroin sold to your deponent on September 10, 1958 and August 26, 1958.

No tax stamps were seen by your deponent on either of the glassine envelopes received from Samuel Panzarella on September

[fol. 102a] fore a like difference in the *quanta* and modes of proof required to establish them.'"

At page 313, the Court said:

"'In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v. [fol. 103a] *United States, supra,* at 175. Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U. S. 132, 162."

In the present case, Costa had not only the benefit of his own observations of the contacts and activities of appellant and Panzarella, but he also had the benefit of the information given him by Agent Moynihan as to the sales of heroin by Panzarella to Moynihan.

An examination of the affidavits of Agents Moynihan and Costa shows that both on August 26, 1958, and on September 10, 1958, appellant and Panzarella were under

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10, or August 26, 1958, nor was the sale of these two packages pursuant to a written order form.

Upon information and belief, Mario DiBella left his apartment #42 35-15 80th Street, Jackson Heights, New York on each of the two occasions described above and met Samuel Panzarella directly thereafter; that Samuel Panzarella then directly proceeded to meet your deponent and the sale of heroin was effected; that Mario DiBella has been a source of supply of illegal heroin hydrochloride for an extended period.

That the source of your deponent's information and the grounds for his belief are the statements made by Samuel Panzarella, the observations and investigation of other narcotic agents and your deponent's personal investigation in this case.

WHEREFORE, your deponent respectfully requests that a night time search warrant issue for the premises described above.

(Sworn to by Daniel D. Moynihan on October 6, 1958.)

the surveillance of each agent. On August 26, for instance, Panzarella agreed to sell Moynihan heroin, and stated that he had to contact his connection. He made a telephone call and then went with Agent Moynihan to 79th Street near Roosevelt Avenue in Jackson Heights. Moynihan saw Panzarella leave his vehicle, walk to 79th Street and 37th Avenue, and enter a green Chrysler automobile with New York license No. 6971NE. Moynihan saw Panzarella leave the Chrysler a few minutes later at 79th Street and [fol. 104a] Roosevelt Avenue, and saw Panzarella return to his vehicle, upon which Panzarella handed to Moynihan the envelope which proved to contain heroin. At the same time, Costa saw appellant enter the same Chrysler automobile and saw him drive to 37th Avenue and 79th Street, saw him meet Panzarella who then entered the Chrysler automobile. He saw the two men drive to 79th Street and Roosevelt Avenue and saw Panzarella leave the automobile. Costa then saw Panzarella walk to 78th Street and meet Agent Moynihan and hand a small envelope to him. The later tests showed that this envelope contained heroin.

Likewise, on September 10, 1958, each agent saw approximately the same procedure followed between Panzarella and appellant. On the latter occasion, Panzarella, after being in contact with appellant, came back to Moynihan and sold him an ounce of heroin which he told Moynihan he obtained from DiBella. Appellant was seen meeting Panzarella, be with him briefly, and Panzarella was seen to immediately return to Moynihan with the heroin.

Taking all of the circumstances together, we believe that there was ample evidence to hold that Costa had "reasonable grounds to believe" that appellant had committed a violation of the narcotics laws. With all the information Costa had, both from his own observation and from information received from Moynihan, Costa would have indeed been naive if he did not believe that appellant had just provided the narcotics which Panzarella delivered to Moynihan. Although Costa's affidavit was based in part on hearsay, there was "a substantial basis for crediting" the information given him by a fellow-agent, information which was wholly consistent with what Costa himself had observed. *Jones* v. *United States*, 362 U. S. 257, 269. We

hold that at any time after September 10, 1958, Costa had reasonable grounds to believe that DiBella had committed a violation of the narcotics laws.

[fol. 105a] Appellant contends, however, that the delay from September, 1958, until March, 1959, when the arrest was made, was sufficient to say that in March, 1959, Costa did not have reasonable grounds to believe that DiBella had committed a narcotics violation. We cannot so hold.

An explanation was given by appellee that the delay was occasioned by a desire on the part of the agents to uncover further violations. Be that as it may, we do not believe that the delay eradicated from Costa's mind the knowledge that he had received by September, 1958, of appellant's apparent violations of the narcotics laws.

When appellant was arrested on March 9, 1959, Costa had in his possession the warrant of arrest which had been issued October 15, 1958, and after arresting appellant under color of this warrant, which we have held to have been invalidly issued, made a return on it showing that he had executed the warrant by arresting DiBella on the 9th day of March, 1959.

We do not believe that this helps appellant. Although Costa apparently believed that this warrant was a valid one, yet, even though it was not, the arrest may be justified on the ground that Costa had reasonable grounds to believe that DiBella had committed a narcotics violation.

In *Williams* v. *United States,* 273 F. 2d 781, the arrest was made upon a warrant of arrest which the Court held to be invalid. However, the arrest was justified on the basis of the arresting officer having reasonable grounds to believe a violation had been committed.

In *Giordenello* v. *United States, supra,* the Supreme Court held that the warrant of arrest was invalid. The case points out, however, that in the Supreme Court, for the first time, the Government contended that the arrest could be justified without a warrant on the basis that there was probable cause to believe that the person arrested had committed a felony. The Supreme Court held that these con-

[fol. 106a] tentions by the Government, having been made for the first time before that Court, were belated, and re-

fused to consider them. The case was reversed, but the Supreme Court stated:

> "This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying upon the warrant."

The arrest of DiBella by Costa, who, on March 9, 1959, had reasonable grounds to believe DiBella had committed a violation of the narcotics law, was a lawful arrest. The arrest being lawful, a reasonable search of appellant's premises, such as shown in this case, was proper. *United States* v. *Rabinowitz*, 339 U. S. 56.

Judgment affirmed.

WATERMAN, *Circuit Judge* (dissenting):

I concur in the holding that, inasmuch as the motion was made prior to indictment, the denial of the motion to suppress is an appealable order. I also agree with my colleagues that the warrant of arrest is invalid under *Giordenello* v. *United States*, 357 U. S. 480 (1958) and earlier cases. However, I am unconvinced that Agent Costa had "reasonable grounds" for arresting DiBella without possessing a valid warrant for his arrest. Therefore, I would hold that the subsequent search of the DiBella home cannot be justified as incidental to DiBella's lawful arrest. Moreover, even assuming *arguendo* that the arrest was a lawful one, I disagree with the conclusion the majority reach that the subsequent search is justifiable as incidental to the arrest.

As the majority opinion sets forth, the "reasonable grounds" contemplated by the Narcotics Control Act, 26 [fol. 107a] U. S. C. §7607, are equivalent to the "probable cause" required under the Fourth Amendment, *Draper* v. *United States*, 358 U. S. 307 (1959), and the quantity and quality of the evidence to substantiate "probable cause" need not be as great as that required for a determination of guilt. *Jones* v. *United States*, 362 U. S. 257, 80 S. Ct. 725 (1960); *Henry* v. *United States*, 361 U. S. 98, 80 S. Ct. 168 (1959); *Draper* v. *United States, supra*, *Brinegar* v.

United States, 358 U. S. 160 (1949); *Carroll* v. *United States*, 267 U. S. 132 (1925).

In determining whether a law enforcement officer had "reasonable grounds" (i.e. "probable cause") to act as he did, we should approach a resolution of the issues in the light of the historical interpretation this language of the Fourth Amendment has been accorded in the past. And, of course, we should look at the occurrence we are examining with the greater particularity when, as here, the officer, unprotected by a prior valid judicial act, invades a family's permanent domicile in the night-time.

The latest of the several Supreme Court summaries setting forth the philosophy underlying the meaning of "upon probable cause" and an historical exemplification of that philosophy appears in *Henry* v. *U. S.*, *supra*. There Justice Douglas states, 361 U. S. 98, 101, 80 S. Ct. 168, 170:

> And as the early American decisions both before and immediately after its [the Fourth Amendment] adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day * * * [citing cases]. Its highwater was Johnson v. United States, supra [333 U. S. 10 (1948)], where the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant.

[fol. 108a] There have been cases where the Supreme Court has gone to some lengths to find probable cause, but I find none where the Court has justified an arrest without an arrest warrant, or approved a search without a search warrant, where the evidence of probable cause was as flimsy and as unconvincing as it is in the instant case.

The *Carroll* and *Brinegar* cases, *supra*, dealt with violations of the federal liquor laws. Defendants in each case were arrested on the open road while transporting liquor. In each case the arresting officer had observed the defendant at some length and could attest personally to the defendant's having handled liquor. Defendants in *Carroll* had offered the officer alcohol on a previous occasion.

Brinegar previously had been arrested by the same officer for illegally transporting liquor, and in the six months preceding the arrest at issue that officer had twice seen the defendant loading liquor into a car or truck.

Draper v. *United States, supra,* dealt with the specific section of the Narcotics Control Act here involved. There the arresting officer had information from a paid "special employee" of the Bureau of Narcotics that Draper was peddling narcotics and would arrive in Denver by train carrying a shipment of narcotics. Draper was arrested as he alighted from the train.

In *Jones* v. *United States, supra,* the question of whether the magistrate who issued a warrant had sufficient competent evidence before him in the officer's affidavit to justify issuance was decided favorably to the Government. Probable cause was there found because the officer's affidavit not only set forth information given by an unnamed informer but also stated that the officer personally knew the persons informed upon, and knew they were narcotics users. Furthermore, the informer had given reliable information in the past and the information given this time was corrob-
[fol. 109a] orated by other informants. See 362 U. S. 267, fn. 2, 80 S. Ct. 734, fn. 2.

What evidence is offered in this case to justify a judicial finding that Agent Costa had "reasonable grounds" (i.e., "probable cause") to arrest DiBella without a warrant? Agent Costa had been told of a statement by one Panzarella, a narcotics peddler, to a fellow-agent, Moynihan, a purchaser, that DiBella was Panzarella's source of supply. The only evidence corroborating this hearsay was the fact that Costa had observed that prior to each of two sales DiBella and Panzarella had met in a car. Costa did not observe any transfer of anything between the two men. On the basis of this evidence Moynihan and Costa on October 6, 1958 applied for a warrant to search DiBella's apartment. U. S. Commissioner Abruzzo denied the application. On October 15, 1958 a defective arrest warrant was issued. On March 9, 1959 DiBella was arrested by three agents in the evening as he was sitting in his living room. It is claimed that during this five months' period the agents were awaiting expected additional violations, but Agent

Costa could not point to a single incident in that five months' period which added to the evidence presented to Commissioner Abruzzo and from which Commissioner Abruzzo could not find probable cause to issue a search warrant.

Draper, Brinegar and Carroll were arrested when there was a real need for rapid action but even in those cases more evidence justifying arrest was introduced than here. In *Brinegar* and *Carroll* additional evidence was compiled during the period of surveillance. Here no such evidence was accumulated, and the informer Panzarella was something less than the trustworthy "special employee" in *Draper*. This case is perhaps closest to *Jones*, but even there more corroborating evidence was introduced, and the initial invasion of the privacy of the apartment where [fol. 110a] Jones was discovered was pursuant to a valid search warrant issued by "an independent judicial officer."

It is interesting to compare the facts in the instant case with those in *Henry* v. *United States, supra*, in which the Supreme Court refused to find probable cause. In *Henry* the arrest followed surveillance by two FBI officers. Henry and a confederate had been seen making two trips transporting cartons in an automobile from a residential section of the city to a tavern. The FBI had developed an interest in Henry because the confederate had been "implicated in interstate shipments" and in that area there had been some whiskey stolen from an interstate shipment. Henry and his confederate were stopped during the second trip and were found to be carrying stolen radios in their car. The Supreme Court reasoned that using an auto to transport small cartons was an outwardly innocent activity, and the FBI agents could not rely in justification for their acts upon an informer's story to them that Henry's confederate was implicated in a former theft of an interstate shipment. DiBella's two meetings with Panzarella were to all outward appearances a more innocent association than the two trips Henry and his confederate were making. No invasion of one's domicile was involved in *Henry*, and the Court recognized that "*Carroll* v. *United States, supra*, liberalized the rule governing searches when a moving vehicle is involved." But even under these circum-

stances the Court went on to say, "But that decision [Carroll] merely relaxed the requirements for a warrant on grounds of *practicality*. It did not dispense with the need for probable cause." (Emphasis supplied.) 361 U. S. 98, 104, 80 S. Ct. 168, 172. Accord, *Rios* v. *United States*, 364 U. S. 253, 80 S. Ct. 143 (1960). See *Eng Fung Jem* v. *United States*, 281 F. 2d 803 (9 Cir. 1960). Moreover, in cases where arrests without warrant have been sought to be justified as having been made upon probable cause the [fol. 111a] courts of appeal have felt constrained to discover special circumstances to justify the arrests. See *United States* v. *Kancso*, 252 F. 2d 220, 224 (2 Cir. 1958); *United States* v. *Volkell*, 251 F. 2d 333, 336 (2 Cir.), *cert. denied*, 356 U. S. 962 (1958); *United States* v. *Walker*, 246 F. 2d 519, 527 (7 Cir. 1957). See also *Williams* v. *United States*, 273 F. 2d 781, 791 (9 Cir.), *cert. denied*, 362 U. S. 951 (1960) (informer was paid employee), relied on by the majority here.

The events which the majority hold gave rise to a reasonable belief that the appellant was guilty of a crime under the narcotics laws on March 9, 1959 occurred in August and September of 1958. This fact casts further doubt on the validity of the majority holding here that the officers had probable cause at 8:15 P.M. on March 9, 1959 to believe that DiBella had committed a narcotics crime recently enough, or was at that moment committing one, so as to justify the warrantless arrest. It is true enough that in cases where the officer has been armed with a valid arrest warrant the rule appears to be that the warrant need not be executed at the first opportunity. But, on the other hand, execution should not be unreasonably delayed. *United States* v. *Joines*, 258 F. 2d 471 (3 Cir.), *cert. denied*, 358 U. S. 880 (1958). The unreasonableness of a delay would depend upon the circumstances present in the particular situation, but thus far no case has been called to my attention, and I have not discovered any, where the courts have approved as reasonable an interval longer than a month between the issuance and the execution of the warrant where there has been opportunity in the meantime to make the arrest. See *United States* v. *Joines*, *supra* (21 days); *Seymour* v. *United States*, 177 F. 2d 732 (D. C. Cir. 1949) (6 days); *State* v.

Kopelow, 126 Me. 384, 138 Atl. 625 (1927) (7 days); *State* v. *Nadeau*, 97 Me. 275, 54 Atl. 725 (1903) (23 days); *Kent* v. *Miles*, 69 Vt. 379, 37 Atl. 1115 (1897) (17 days). The [fol. 112a] permissible interval between the events giving rise to a narcotic agent's reasonable grounds to believe that a person has committed or is committing a narcotics crime and the agent's actual arrest of such a person was considered by the Fifth Circuit in *Dailey* v. *United States*, 261 F. 2d 870, 872 (5 Cir. 1958), *cert. denied*, 359 U. S. 969 (1959), the court stating that the arresting officer "may defer the arrest for a day, a week, two weeks, or perhaps longer." Surely in the present case where no new evidence was uncovered during the entire period of five months to justify the delayed arrest, we are faced with a very stale "probable cause." I would hold that the arrest of a person who has been under surveillance for seven months—an arrest that is made by an officer not possessed of a valid arrest warrant but which the officer seeks to justify by events that occurred five months before—is not a lawful arrest. The majority find that the knowledge the officers possessed on October 6, 1958 makes the March 9, 1959 arrest lawful, and the subsequent search lawful. This is the identical knowledge that Commissioner Abruzzo on October 6, 1958 found insufficient to justify the issuance of a warrant to search those very premises at a time when the information was not stale.

However, assuming that the officers had probable cause to arrest DiBella the search of his home cannot even then be justified. The mere fact that a search immediately follows a valid arrest does not conclusively establish the reasonableness of that search. *Abel* v. *United States*, 362 U. S. 217, 235, 80 S. Ct. 683, 695 (1960); *United States* v. *Rabinowitz*, 339 U. S. 56, 65-66 (1950). See *Rios* v. *United States*, *supra*, at 261, 80 S. Ct. at 1436. A long and inconsistent series of cases has attempted to define the permissive area of a valid search incidental to an arrest. But as Justice Frankfurter pointed out this year in *Abel*:

> [fol. 113a] The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluc-

tuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, with Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374, and United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, compare Go-Bart, supra, and Lefkowitz, supra, with Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399, and United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653; compare also Harris, supra, with Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663, and Trupiano with Rabinowitz, supra (overruling Trupiano). Of these cases, Harris and Rabinowitz set by far the most permissive limits upon searches incidental to lawful arrests. 362 U. S. at 235, 80 S. Ct. at 695.

Although Justice Frankfurter, in *Abel*, was unwilling to attempt a reconciliation of the cases, he had on two prior occasions analyzed in detail the decisions involving searches and seizures incidental to arrests. *Harris* v. *United States*, 331 U. S. 145, 155-183 (1947) (dissent); *United States* v. *Rabinowitz, supra*, at 68-86 (dissent). From his analysis we can discern a pattern that has eroded the homeowner's right to personal privacy in his dwelling to the point where it would seem that the entire home is subject to search by the police if armed with a valid warrant for the homeowner's arrest. *Harris* v. *United States, supra. Trupiano* v. *United States, supra*, restricted *Harris* by pointing out that such a broad search without a search warrant could only be condoned as incidental to a lawful arrest where [fol. 114a] there was a practical necessity for speed. The need for this showing was later rejected in *United States* v. *Rabinowitz, supra.* Therefore, now, as a result of this steady erosion, on the authority of *Harris*, as resurrected by *Rabinowitz*, a prisoner's apartment may be lawfully searched without a search warrant as incidental to his lawful arrest, unless the prisoner's situation is meaningfully distinguishable from that present in those cases.

Two factors distinguish the instant case. First, in *Harris* and *Rabinowitz* a *valid* warrant of arrest had been issued. Thus there had been a proper decision by a disinterested magistrate that probable cause of guilt existed. No valid warrant issued here. There is no Supreme Court case upholding the officers' acts where a home was searched by officers armed with neither an arrest warrant nor a search warrant. *Draper* v. *United States, supra,* involved the search of a prisoner's person; *Brinegar* and *Carroll* the search of the prisoners' automobiles. It is certainly clear that "There is a vast difference between entering and searching homes or even hotel rooms which are fixed and more or less permanent locations and stopping a person or car on a highway for the same purpose. A warrant can usually be obtained in the first situation without too much risk that the object of the search will disappear." *United States* v. *Kancso,* 252 F. 2d 220, 223 (2 Cir. 1958).

As Justice Douglas speaking for the Court has said:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the [fol. 115a] law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. *McDonald* v. *United States,* 335 U. S. 451, 455-56 (1958).

Second, in further contrast to *Harris* and *Rabinowitz*, DiBella's arrest and the subsequent search of his residence occurred in the night-time. Rule 41(c) of the Federal Rules of Criminal Procedure provides that a search warrant shall be restricted to daytime execution unless the affidavit indicates positively that the objects to be seized are upon the premises. See also *Distefano* v. *United States*, 58 F. 2d 963 (5 Cir. 1932). In *Jones* v. *United States*, 357 U. S. 493, 498-499 (1958), the Supreme Court stated, by Justice Harlan, that the provisions relative to night-time search in Rule 41(c) are "hardly compatible with a principle that a search without a warrant can be based merely upon probable cause." To be sure, the probable cause the Court was there discussing was probable cause for the existence of objects of seizure rather than probable cause to justify an arrest. But I see no difference in principle between the two situations.

Thus, it is clear that the majority is not merely applying the rationale of *Harris* and *Rabinowitz*, but is amplifying and extending the doctrine of those cases. Furthermore, the fact that the search uncovered narcotics cannot change [fol. 116a] the result, for "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States* v. *Di Re*, 332 U. S. 581, 595 (1948). Nor do I find persuasive the argument that such searches are necessary for the effective control of narcotics traffic, Justice Jackson, speaking for the Court, disposed of this argument in *United States* v. *Di Re, supra*, at 595:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

And as Justice Douglas said in his dissent in *Draper* v. *United States, supra,* at 314-15:

> Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike. If the word of the informer on which the present arrest [fol. 117a] was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.

Appellant DiBella was sitting in his living room one night when Agent Costa together with other agents entered and arrested him on the most specious of stale grounds. This arrest then became the basis of an exhaustive search of appellant's home.[1] To condone such activity "is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest." *United States* v. *Rabinowitz, supra,* at 80 (Frankfurter, *J.,* dissenting). To approve the officers' acts here is to take another long step away from the original concepts of ordered liberty expressed in the Fourth Amendment. I would suppress the evidentiary material seized by the agents.

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[1] There is no agreement as to the number of agents who participated in the arrest and search. But there were at least five. The government affidavit admits to five, and identifies these five by name. Two of them accompanied Costa at the time of the initial entry. Two more then joined these three when the search began. I suggest that this was more than enough manpower to make the simple arrest and that the agents' real purpose in entering DiBella's apartment was to conduct a search there without first applying for and obtaining a search warrant.

[fol. 118a]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Oliver D. Hamlin, Jr., Circuit Judges.

In the Matter of the Application of

MARIO DIBELLA, Appellant.

JUDGMENT—November 23, 1960

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed.

[fol. 119a] [File endorsement omitted]

[fol. 120a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 121a]

SUPREME COURT OF THE UNITED STATES

No. 574, October Term, 1960

MARIO DIBELLA, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—February 20, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.